

No. 10708

United States
Circuit Court of Appeals
For the Ninth Circuit.

Vol
2387

R. J. REYNOLDS TOBACCO COMPANY and
L. R. DONNELLY,

Appellant,

vs.

GEORGE H. NEWBY, in his own behalf, RICH-
ARD ARLEN NEWBY and PATTY ANN
NEWBY, both minors, by their Guardian ad
Litem, George H. Newby,

Appellees.

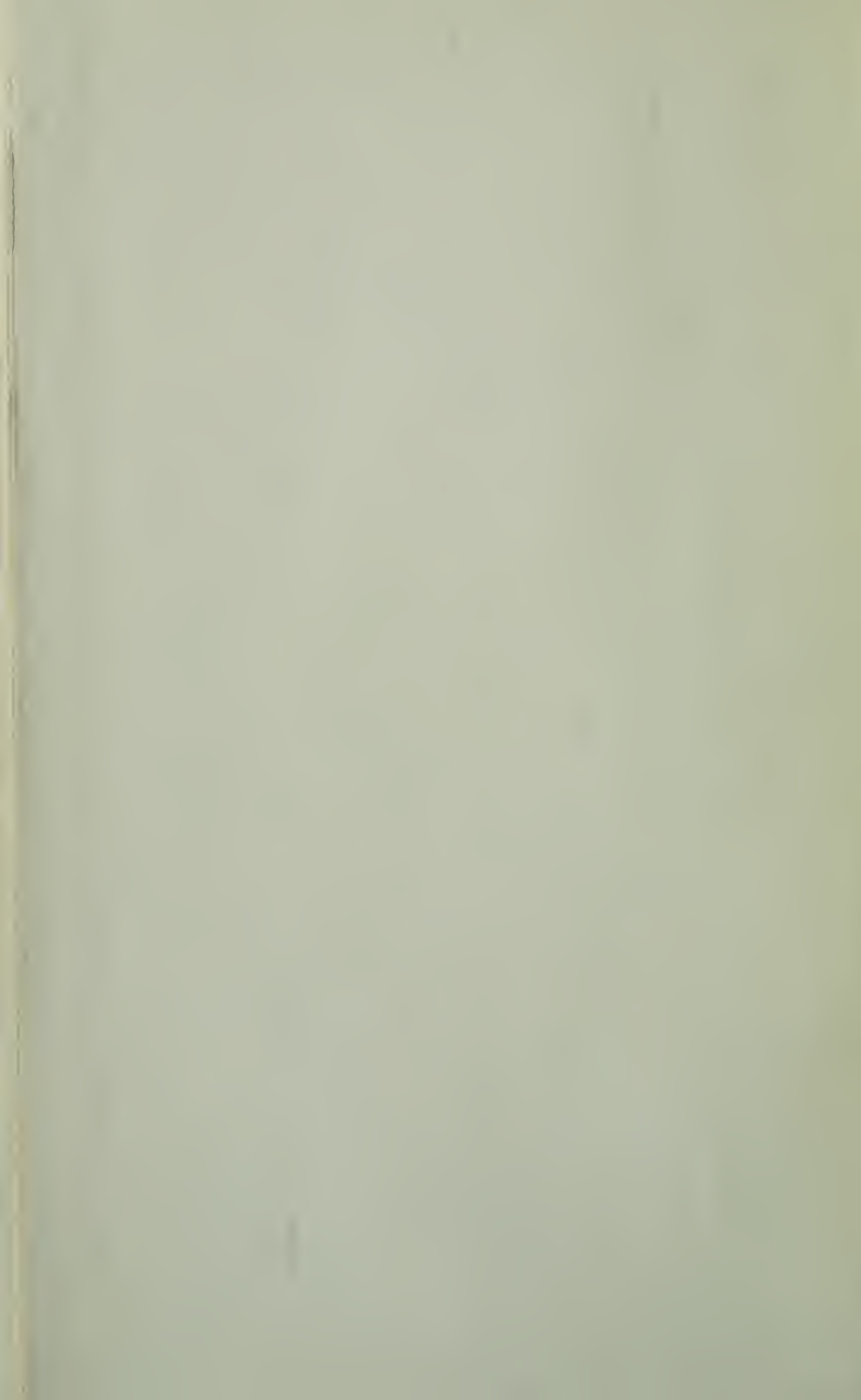
Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Idaho
Eastern Division

FILED

MAY 11 1944

PAUL P. O'BRIEN,
CLERK



B. W. DAVIS

Attorney at Law
Ross-Davis Bldg.
Pocstello, Idaho.

September-22, 1944.

Mr. Paul P. O'Brian, Clerk,
U. S. Circuit Court of Appeals,
San Francisco, 1, California.

Re: No. 10708 - Reynolds Tobacco Co. et al
vs. George Newby, et al.

Dear Mr. O'Brien:

In talking to Mr. Merrill since he returned from Portland, I was a little concerned about the impression that may have been left with the court about the reason for my not appearing. I may be unduly apprehensive about this, but it will do no harm for me to write you about it.

I was of the impression that I had indicated in our correspondence that the matter would probably be submitted without argument by the Appellees and because of the fact that I could not hear from Mr. Newby who is somewhere in the South Pacific, and that I had no authority to go to the expense of the trip without Newby's authorization and that it would probably be impossible for Mr. Coughlan to be present, because of his being in the service.

In my discussion of the matter with Mr. Merrill, I did not intend to make any statements to him or to place any burden upon him to make any explanation to the court.

I felt I was in position where so far as I was concerned, the matter had to be submitted without argument if I did not hear from Mr. Newby before the time of the argument.

Probably this matter does not need to be called to the attention of the court at this time. If it does, I am sure you will know and if it does need any further explanation I would appreciate having you call this letter to their attention. Otherwise, just ignore it.

Thanking you for the kindness you have shown me in this matter, I am

Yours very truly,

B. W. DAVIS.

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United States
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R. J. REYNOLDS TOBACCO COMPANY and
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NEWBY, both minors, by their Guardian ad
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Transcript of Record

Upon Appeal from the District Court of the United States
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

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Boise, Idaho

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Attorneys for Appellants.

GLENN A. COUGHLIN,

Montpelier, Idaho.

B. W. DAVIS,

Pocatello, Idaho,

Attorneys for Appellees.

ROY L. BLACK,

JOHN R. BLACK,

Pocatello, Idaho,

Attorneys for Rulon D. Hair, Defendant,
who is not an Appellant. [*2]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the Fifth Judicial District
of the State of Idaho, in and for the County of
Bear Lake

Transcript on Removal

No. 1196

GEORGE H. NEWBY, in his own behalf; RICH-
ARD ARLEN NEWBY, and PATTY ANN
NEWBY, both minors, by their Guardian Ad
Litem, GEORGE H. NEWBY,

Plaintiffs,

vs.

R. J. REYNOLDS TOBACCO COMPANY, L. R.
DONNELLY and RULON D. HAIR,

Defendants.

COMPLAINT

Comes now the plaintiffs and for a cause of action
against the defendants, complain and allege:

I.

That George H. Newby is a widower, the sur-
viving husband of Avenell Newby, and the father
of Richard Arlen Newby and Patty Ann Newby,
the children of Avenell Newby, deceased, and the
plaintiff. That said Richard Arlen Newby is a
minor of the age of approximately eight years, and
Patty Ann Newby is a minor of the age of ap-
proximately six years and that George H. Newby
was, on the 28th day of September, 1942, by order
of the above entitled court, duly made and entered,
duly and regularly appointed guardian ad litem
for said Richard Arlen Newby and Patty Ann

Newby with authority to institute, maintain, and conclude this suit. That the said George H. Newby, Richard Arlen Newby and Patty Ann Newby, minors, are the sole and only heirs at law of the said Avenell Newby, deceased.

II.

That the R. J. Reynolds Tobacco Company, one of the defendants herein is a corporation organized and existing under and by virtue of the laws of the State of North Carolina and doing business in the State of Idaho, as a foreign corporation. [3]

III.

That at all times hereinafter mentioned the defendant L. R. Donnelly was a citizen and resident of the State of Utah with his place of business and residence in Salt Lake City, State of Utah.

IV.

That at all times hereinafter mentioned the defendant, Rulon D. Hair was a citizen and resident of the State of Idaho with his residence and place of business in the City of Pocatello, Bannock County, Idaho.

V.

That the defendant, Rulon D. Hair, at all times hereinafter mentioned was the duly authorized, agent, servant, and employee of the defendant, R. J. Reynolds Tobacco Company and Defendant, L. R. Donnelly, and was at all times hereinafter mentioned engaged in the course, scope, and line of his business for the above mentioned defendants,

R. J. Reynolds Tobacco Company and L. R. Donnelly.

VI.

That at all times hereinafter mentioned the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly, furnished the defendant Rulon D. Hair, a Chevrolet Panel Truck, bearing State of Idaho, truck license 3A-150 and was used by said Hair in the prosecution of the business of said defendants tobacco company and Donnelly in the line, course, and scope of the employment of said Hair as an employee of said defendant Donnelly and said tobacco company.

VII.

That on the 11th day of September, 1942, at about 4:30 P. M., the deceased, Avenell Newby, was riding as a guest of the defendants in the above described Chevrolet Panel Truck, which at said time and place was being driven and operated by the defendant Rulon D. Hair, while acting within the line, course and scope of his employment as agent, servant or employee of the defendant Donnelly and defendant tobacco company, in a southerly direction on U. S. Highway 30 North at a point about 17 miles North of Montpelier, Idaho; that the said defendant Hair at said time and place negligently, carelessly, and recklessly and in complete disregard of the rights of others and particularly of the deceased, Avenell Newby, drove said automobile on said highway at an excessive, unreasonable, and dangerous [4] rate of speed, to-wit: 65 miles per

hour, while being warned by the deceased not to drive so fast, and then and there swerved back and forth across the road several times and ran off the East side of the road and tipped over, and inflicted divers and serious injuries upon plaintiffs deceased wife, Avenell Newby, from which she died on the 16th day of September, 1942.

VIII.

That by reason of the injuries received by the said deceased, Avenell Newby, at the time and place above mentioned, she was cut, mangled, torn, bruised, lacerated and injured internally to such an extent that as a direct result thereof she died on September 16th, 1942 about five days after said accident.

IX.

That at said time and place the defendant Rulon D. Hair was negligent, careless, and heedless directly, and the defendants Donnelly and Tobacco Company were negligent, careless, and heedless through and by said Hair, as their agent, servant, or employee while acting within the line, course and scope of his employment, in the following particulars:

In driving said truck along said highway at an unreasonable, excessive, dangerous, and unlawful rate of speed, to-wit: 65 miles per hour, in violation of the law of the State of Idaho. In not heeding deceased's warning to not drive so fast; in swerving back and forth across the highway several times; in running off the highway; in not

having said truck under such control as to be able to stop and avoid running off the highway and mortally injuring the plaintiff's deceased wife, Avenell Newby.

X.

That one, more, or all of the aforesaid acts of negligence proximately caused the accident and injuries from which plaintiff's wife, Avenell Newby, died.

XI.

That at the time of the above mentioned accident there was in full force and effect in the State of Idaho a statute, 48-504 (8) of the Idaho Code Annotated, (1932) which provides a speed limit of 35 miles per hour on highways and makes it unlawful to exceed this speed limit. [5]

XII.

That the said Avenell Newby was of the age of 28 years; a strong, healthy woman, capable of making a home and doing the housework for the plaintiff George Newby and their minor children, Richard Arlen Newby and Patty Ann Newby, had she lived. That she was a kind and friendly person and was devoted to her family. That the minor children were dependent upon her for their care and guidance. That by reason of her death her husband, George H. Newby, has lost the love, comfort, and companionship of a devoted wife. That the minor children, Richard Arlen Newby and Patty Ann Newby, have lost the love, comfort, and care and

companionship that only their mother could give to the damage of the said George H. Newby and Richard Arlen Newby and Patty Ann Newby in the sum of \$100,000.00. That by reason of the injuries resulting in the death of the deceased, Avenell Newby, expenses were incurred for medical services in the amount of \$115.00 and for funeral and burial services in the amount of \$268.20.

Wherefore, the plaintiff, George H. Newby on *her* own behalf and as guardian ad litem for Richard Arlen Newby and Patty Ann Newby, prays for damages against the defendants and each of them for the amount of One Hundred Thousand Dollars general damages, and \$115.00 for medical services and \$268.20 funeral and burial expenses; for their costs of suit herein expended and for such other and further relief as may be found just and equitable in the premises.

GLENN A. COUGHLAN,

Attorney for Plaintiffs.

Residence and Post Office Address: Montpelier, Idaho.

(Duly Verified.) [6]

[Endorsed]: Filed September 29, 1942. [7]

[Title of Court and Cause in State Court.]

PETITION FOR AN ORDER APPOINTING
GUARDIAN AD LITEM OF RICHARD
ARLEN NEWBY AND PATTY ANN
NEWBY, BOTH MINORS.

Your petitioner respectfully represents:

I.

That Richard Arlen Newby is a minor of the age of approximately eight years, and that Patty Ann Newby is a minor of approximately six years, children of George H. Newby, petitioner herein.

II.

That in the 16th day of September, 1942, Avenell Newby, the mother of Richard Arlen Newby and Patty Ann Newby was killed while riding as a guest of Rulon D. Hair, while he was in the line, course, and scope of his employment for L. R. Donnelly and the R. J. Reynolds Tobacco Company, in an automobile operated and driven by the said Rulon D. Hair.

III.

That your petitioner believes and therefore alleges that said Richard Arlen Newby and Patty Ann Newby have a good cause of action against the R. J. Reynolds Tobacco Company, L. R. Donnelly and Rulon D. Hair.

Wherefore, your petitioner prays that the court enter an order appointing your petitioner as guardian ad litem of the said Richard Arlen Newby and

Patty Ann Newby for the purpose of instituting and maintaining a suit for damages against the said Reynolds Tobacco Company, L. R. Donnelly and Rulon D. Hair.

GEORGE H. NEWBY,
Petitioner.

(Duly verified.) [8]

[Endorsed]: Filed Sept. 29, 1942. [9]

[Title of Court and Cause in State Court.]

ORDER APPOINTING GUARDIAN AD LITEM

Upon reading and filing the petition of George H. Newby filed herein, wherein it is prayed that George H. Newby be appointed guardian ad litem for Richard Arlen Newby and Patty Ann Newby, minors; and it appearing to the undersigned Judge of the above entitled Court that George H. Newby is a competent and responsible person, and that it is expedient that he be appointed to represent said minors for the purpose of instituting, maintaining and concluding a suit against R. J. Reynolds Tobacco Company, a corporation, L. R. Donnelly and Rulon D. Hair, as outlined in said petition;

Now, Therefore, It Is Ordered that the said George H. Newby be and he is hereby appointed guardian ad litem for the said Richard Arlen Newby and Patty Ann Newby, and it is further ordered that said George H. Newby as such guardian ad litem be and he is hereby authorized and

directed to institute, prosecute and conclude said action referred to in said petition on behalf of said Richard Arlen Newby and Patty Ann Newby, minors.

Dated this 28th day of September, 1942.

ISAAC MC DOUGALL,

District Judge.

[Endorsed]: Filed Sept. 28, 1942. [10]

[Title of Court and Cause in State Court.]

ORDER FOR REMOVAL

This cause coming on regularly for hearing upon petition and bond of the defendants R. J. Reynolds Tobacco Company, L. R. Donnelly and Rulon D. Hair, herein, for an order transferring this cause to the United States District Court for the District of Idaho, Eastern Division; and

It Appearing to the Court that said defendants R. J. Reynolds Tobacco Company, L. R. Donnelly and Rulon D. Hair have filed their petition herein for such removal in due form of law, and that they have also filed their bond duly conditioned with good and sufficient surety, as provided by law, and that said defendants have given plaintiffs due and regular notice thereof; and that all of said papers were duly filed before the time for said defendants to appear had expired, and

It Further Appearing to the Court that this is a proper cause for removal to the United States Dis-

trict Court for the District of Idaho, Eastern Division;

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed, that said petition and bond be, and the same are hereby accepted and approved, and that the above entitled cause be, and the same is hereby removed to the United States District Court for the District of Idaho, Eastern Division, and that all further [11] proceedings in this court be stayed and the clerk of the District Court of the Fifth Judicial District of the State of Idaho, in and for Bear Lake County, is hereby directed to make up the record in said cause and submit the same to the United States District Court for the District of Idaho, Eastern Division, on or before thirty days from the date of the filing of said petition.

Dated this 26th day of October, 1942.

ISAAC McDOUGALL

District Judge.

[Endorsed]: Filed Oct. 26, 1942. [12]

[Title of Court and Cause.]

**MOTION TO DISMISS AND TO MAKE MORE
DEFINITE AND CERTAIN**

Come Now, The defendants, Reynolds Tobacco Company and L. R. Donnelly, and each of them, and move the court to dismiss the above entitled action upon the ground that the complaint fails to

state a claim upon which relief can be granted against them, or either of them.

Said defendants, and each of them, further move the court that if said motion to dismiss be not granted them, then and in that event the plaintiffs be required to make a more definite statement of the alleged negligence of the defendant, Rulon D. Hair; also the manner in which it will be contended said Rulon D. Hair recklessly drove said automobile upon the highway, and of what said alleged reckless conduct actually consisted, and what it will be contended he did, which constituted reckless disregard of the rights of the deceased.

Dated November 14, 1942.

E. B. SMITH

Residing at Boise, Idaho

A. L. MERRILL

R. D. MERRILL

Residing at Pocatello, Idaho

Attorneys for defendants, R.

J. Reynolds Tobacco Company and L. R. Donnelly.

(Affidavit of Service Attached.)

[Endorsed]: Filed Nov. 14, 1942. [13]

[Title of Court and Cause.]

MOTION TO DISMISS AND MAKE MORE
DEFINITE AND CERTAIN

Comes now the defendant Rulon D. Hair, and moves the Court to dismiss the above entitled action upon the grounds that the complaint fails to state a claim against this defendant upon which relief can be granted against him.

Said defendant further moves the court that if said Motion to Dismiss be not granted, then, and in that event, said defendant moves that the plaintiffs be required to make a more definite statement of the alleged negligence of the defendant and the manner in which it will be contended that the defendant Rulon D. Hair recklessly drove said automobile upon the highway and of what said reckless conduct actually consisted and that which it will be contended he did which constituted disregard of the rights of the deceased.

Dated this 14th day of November, 1942.

ROY L. BLACK &

JOHN R. BLACK

Attorneys for Defendant

Rulon D. Hair

Residing at: Pocatello, Idaho.

(Affidavit of Mailing Attached.)

[Endorsed]: Filed Nov. 16, 1942. [14]

[Title of Court and Cause.]

MINUTES OF THE COURT

February 6, 1943

This cause came on for hearing on motions to dismiss and motion for a more definite statement in the complaint. Glenn A. Coughlin, Esquire, appeared for the plaintiffs and Messrs. E. B. Smith and A. L. Merrill, Esquires, appeared for the defendant Reynolds Tobacco Company and R. L. Donnelly. On agreement between counsel for the plaintiff and attorneys for the defendant Rulon D. Hair, the motions of defendant Hair were submitted to the Court upon the argument presented by counsel for the other defendants.

After hearing argument of counsel, it was ordered that the motions to dismiss and to make more definite and certain by the defendants R. J. Reynolds Tobacco Co. and Rulon D. Hair, and each of them, is denied. Exceptions were allowed to each of the defendants and twenty-five days were granted for filing of answer to complaint. [15]

[Title of Court and Cause.]

ORDER ON MOTIONS

The motions of the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly and of the defendant Rulon D. Hair to dismiss and to make more definite and certain were argued before the Court the 6th day of February, 1943 at Boise,

Idaho, pursuant to agreement of counsel for the respective parties to this cause. Mr. Glenn A. Coughlan appeared for the plaintiff and Messrs. E. B. Smith and A. L. Merrill appeared for the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly. Pursuant to agreement between the attorney for the plaintiffs and the attorneys for the defendant Rulon D. Hair, the motions of Rulon D. Hair were submitted to the Court upon argument of counsel for the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly.

After hearing argument of the respective counsel on the motions, and the Court having duly considered the same and being fully advised in the premises;

It Is Hereby Ordered And This Does Order, That the motions to dismiss and to make more definite and certain of the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly and of the defendant Rulon D. Hair are, and each of them hereby is, denied. [16]

Exceptions to the ruling of the Court are hereby granted to each and all of the defendants. Upon stipulation of counsel for the respective parties in open court it is hereby further ordered that the defendants and each of them be, and they are hereby granted twenty-five days from date hereof within which to prepare, serve and file their respective answers in this cause.

Dated this 6th day of February, 1943.

LLOYD L. BLACK,

United States District Judge.

Presented by Glenn A. Coughlan, Counsel for plaintiffs.

GLENN A. COUGHLAN,

Attorney for Plaintiffs.

O.K. as to form

A. L. MERRILL

E. B. SMITH

[Endorsed]: Filed Feb. 6, 1943. [17]

[Title of Court and Cause.]

DEMAND FOR JURY TRIAL

To R. J. Reynolds Tobacco Company, R. J. Donnelly, and Rulon D. Hair, and Their Attorneys, E. B. Smith, A. L. Merrill of Merrill & Merrill and Roy L. Black of Black & Black:

Demand is hereby made by the plaintiffs in the above entitled cause for jury trial in the above entitled cause. Dated February 15, 1943.

GLENN A. COUGHLAN,

Attorney for Plaintiff

Montpelier, Idaho.

[Endorsed]: Filed Feb. 25, 1943. [18]

[Title of Court and Cause.]

ANSWER OF R. J. REYNOLDS TOBACCO
COMPANY AND L. R. DONNELLY

Come now R. J. Reynolds Tobacco Company and L. R. Donnelly, two of the defendants in the above entitled cause, and for answer to the complaint of plaintiffs on file herein admit, deny and allege as follows:

FIRST DEFENSE

The complaint fails to state a claim against these answering defendants, or either of them, upon which relief can be granted.

SECOND DEFENSE

I.

These defendants deny each and every allegation of said complaint not hereinafter specifically admitted.

II.

Answering paragraph numbere I of said complaint these defendants admit the allegations contained therein, save and except the allegation with reference to the order appointing guardian ad litem, and in this respect allege said order was made and entered by the District Court of the Fifth Judicial District of the State of Idaho in and for the County of Bear Lake. [19]

III.

These defendants admit the allegations contained in paragraphs Numbered II and III of said complaint.

IV.

These defendants deny the allegations of paragraph numbered IV of said complaint. Defendants allege, however, that at the time of filing of said complaint the said Rulon D. Hair was and now is a citizen and resident of the State of Utah.

V.

These defendants deny the allegations contained in paragraph numbered V of said complaint. Further answering said paragraph defendants allege that the said Rulon D. Hair had been acting as a salesman for the R. J. Reynolds Tobacco Company but was not so acting at the time nor with reference to any of the matters or things alleged in said complaint and none of said alleged acts were committed within the course, scope or line of any business or employment for the R. J. Reynolds Tobacco Company or L. R. Donnelly; that at the time of the alleged accident the said Hair was on a trip of his own and not for these defendants and was otherwise violating instructions of these defendants as hereinafter more fully set forth.

VI.

These defendants deny the allegations contained in paragraph numbered VI of said complaint. Further answering said paragraph, however, defendants alleged that the Chevrolet Panel Truck therein described was the property of R. J. Reynolds Tobacco Company and was for the use of said Rulon D. Hair when engaged in the business of said company and not otherwise.

VIII.

These defendants deny the allegations contained in paragraph numbered VII of said complaint. Further answering said paragraph these defendants allege that they have been [20] informed that at the time and place mentioned in said complaint Avenell Newby was riding in said Chevrolet Panel Truck as a gratuitous guest of Rulon D. Hair, but positively deny that she was a guest of either of these defendants. Defendants further allege that Rulon D. Hair was at said time under positive instructions from the R. J. Reynolds Tobacco Company and L. R. Donnelly not to accept for transportation in said automobile at any time any guest nor permit any person, other than a bona fide agent of the company to ride with him in said automobile and if he accepted Avenell Newby as a guest such was contrary to instructions theretofore given him, and was outside the scope of his employment and her presence in said car was without the knowledge or consent of these defendants and for the consequences of which neither of these defendants are liable under any circumstances.

VIII.

Answering paragraph numbered VIII of said complaint, these defendants admit that Avenell Newby was injured and that she died September 16, 1942, but deny the remaining allegations of said paragraph.

IX.

These defendants deny the allegations contained in paragraph numbered IX of said complaint.

X.

These defendants deny the allegations contained in paragraph numbered X of said complaint.

XI.

Answering paragraph numbered XI of said complaint, these defendants admit the existence of Section 48-504 (8) Idaho Code Annotated, 1932, but deny the materiality of said allegation and further deny the legal effect and conclusions drawn therefrom by the plaintiffs, and deny the remaining [21] allegations of said paragraph.

XII.

These defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph numbered XII of said complaint, and upon this ground denies said allegations and all of them, except defendants admit that Avenell Newby was of the age of twenty-eight years or thereabouts. These defendants positively deny that said plaintiffs or any of them have suffered any loss or damage of any kind or character by reason of any act or thing by them suffered or permitted.

THIRD DEFENSE

Further answering said complaint and as an additional defense thereto these defendants allege that

any injuries which the said Avenell Newby may have received in the accident described in the complaint and the damages to the plaintiffs, if any, resulting therefrom were proximately caused or contributed to by the negligence and carelessness of the said Avenell Newby, who was then and there guilty of contributory negligence and said injuries were not the result of negligence or want of care on the part of any of the defendants named in said complaint.

FOURTH DEFENSE

Further answering said complaint and as a further affirmative defense thereto these defendants upon their information and belief allege that at the time and place mentioned in said complaint the said Avenell Newby was, and for some hours prior thereto, had been riding in said automobile as a gratuitous guest of Rulon D. Hair, but not of these defendants, and all matters and things touching said trip and the operation of said automobile by Rulon D. Hair were fully known to her, and, having such information, she continued to [22] ride in said automobile and acquiesced in each and every thing done with respect thereto, and the driving of said automobile, and with such knowledge and acquiescence she thereby assumed all risk attendant thereon and by reason whereof no recovery can be had for damages, if any, which may have resulted from the accident alleged in the complaint.

FIFTH DEFENSE

Further answering said complaint and as a further defense thereto defendants allege that the injuries which Avenell Newby may have sustained and the damages, if any, suffered by the plaintiffs, were the result of matters and things over which the driver of said automobile had no control and said accident occurred without fault on his part.

Wherefore, having fully answered said complaint, these defendants pray that plaintiffs take nothing by reason thereof and that they recover their costs incurred herein.

E. B. SMITH

Residing at Boise, Idaho.

A. L. MERRILL,

Residing at Pocatello, Idaho.

R. D. MERRILL,

Residing at Pocatello, Idaho.

Attorneys for R. J. Reynolds
Tobacco Company and L.
R. Donnelly.

(Duly verified.) [23]

The defendants R. J. Reynolds Tobacco Company and L. R. Donnelly hereby demand a trial by jury.

E. B. SMITH

A. L. MERRILL

R. D. MERRILL

Attorneys for said Defendants

(Affidavit of Mailing attached)

[Endorsed]: Filed March 1, 1943. [24]

[Title of Court and Cause.]

ANSWER OF DEFENDANT
RULON D. HAIR.

Comes now Rulon D. Hair, defendant in the above entitled cause and for answer to the complaint of the plaintiffs on file herein, admits, denies and alleges as follows:

FIRST DEFENSE

The complaint fails to state a claim against this answering defendant upon which relief can be granted.

SECOND DEFENSE

I.

Defendant denies each and every allegation of said complaint not specifically admitted herein.

II.

Answering paragraph I of said complaint this defendant admits the allegations contained therein, save and except the allegations with reference to the order appointing guardian ad litem, and in this report alleges said order was made and entered by the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Bear Lake.

III.

Defendant admits the allegations of paragraph II and III of said complaint.

IV.

Answering paragraph IV defendant denies the

allegations thereof; [25] defendant alleges that at the time of the filing of said complaint the defendant was and now is a citizen and resident of the State of Utah.

V.

Answering paragraph V this defendant admits that he had been acting as salesman for the R. J. Reynolds Tobacco Company and denies each and every other allegation of said paragraph.

VI.

Answering paragraph VI defendant admits that defendant R. J. Reynolds Tobacco Company furnished this defendant Rulon D. Hair a Chevrolet truck bearing State of Idaho truck license No. 3A-150 to be used by the defendant in the prosecution of his business for said Tobacco Company in the line, course and scope of his employment by said defendant, R. J. Reynolds Tobacco Company and denies each and every other allegation of said paragraph VI of said complaint.

VII.

Answering paragraph VII this defendant admits that on to-wit: The 11th day of September, 1942, at about 4:30 P. M. one Avenell Newby was riding with this defendant as a guest of this defendant in the said above described Chevrolet panel truck which at said time and place, was being driven and operated by this defendant and that said truck was being driven in a southerly direction on U. S. Highway 30N at a point about 17 miles north of Mont-

pelier, Idaho; and defendant denies each and every other allegation of said paragraph; further answering said paragraph defendant alleges that he was driving on said highway at a speed not exceeding 35 miles per hour.

VIII.

Answering the allegations of paragraph VIII the defendant alleges that the said Avenell Newby was riding in said truck with the defendant at her own request and instance as hereinbefore stated and without any invitation from this defendant, said Avenell having requested defendant to permit her to ride with him. [26]

IX.

Defendant denies each and every allegation contained in paragraph IX of said complaint.

X.

Defendant denies each and every allegation contained in paragraph X of said complaint.

XI.

Answering paragraph XI of said complaint defendant admits the existence of said Section 48-504 (8) Idaho Code Annotated, 1932, but denies the materiality of said allegations of said Statute and further denies the legal effect and conclusions drawn therefrom by plaintiffs.

XII.

Answering paragraph XII of the complaint defendant admits that said Avenell Newby was about the age of 28 years and denies each and every other

allegation of said paragraph; defendant specifically denies that said George H. Newby, Richard Arlen Newby and Patty Ann Newby have been damaged in any sum or amount by reason of any act or omission on the part of this defendant.

THIRD DEFENSE

Further answering said complaint and as an additional defense thereto this defendant alleges that any injuries which the said Avenell Newby may have received in the accident described in the complaint and the damages to plaintiffs, if any, resulting therefrom, were proximately caused or contributed to by the negligence of the said Avenell Newby who was then and there guilty of contributory negligence and that said injuries were not the result of negligence or want of care on the part of this defendant or any of the defendants named in the complaint.

FOURTH DEFENSE

Further answering the said complaint and as a further affirmative defense this defendant alleges: That at the time and place mentioned in said complaint the said Avenell Newby was and for some time prior thereto had been riding in said automobile as a gratuitous guest of this defendant and at [27] her own request, and that all matters and things touching the said truck and the operation of said automobile by this defendant were fully known to her and having such information she continued to ride in such automobile and acquiesce and join with

the defendant in each and every thing done with respect thereto, and the driving of said automobile, and with such knowledge and acquiescence she thereby assumed all risk attendant thereon and by reason whereby no recovery can be had for damages, if any, which may have resulted from the accident alleged in the complaint.

FIFTH DEFENSE

Further answering said complaint and as a further defense thereto this defendant alleges that the injuries which Avenell Newby may have sustained and damages, if any, suffered by plaintiffs, were the result of matters and things over which this defendant had no control and said accident occurred without fault and without negligence on the part of this defendant.

Wherefore, having fully answered said complaint, this defendant prays that plaintiffs take nothing by reason thereof and that this defendant recover his costs incurred herein.

ROY L. BLACK

JOHN R. BLACK

Attorneys for Defendant,

Rulon D. Hair

Residence: Pocatello, Idaho.

Defendant Rulon D. Hair hereby demands a trial by jury.

ROY L. BLACK

JOHN R. BLACK

Attorneys for Defendant,

Rulon D. Hair

Residence: Pocatello, Idaho.

(Duly verified)

(Service acknowledged)

[Endorsed]: Filed March 3, 1943. [28]

[Title of Court and Cause.]

MINUTES OF THE COURT

March 22, 1943

This cause came on for hearing on the defendants' objections to plaintiffs' interrogatories filed herein, and also for hearing on the plaintiffs' motion to require the production of certain documents and records. Messrs. Glen A. Coughlin and B. W. Davis appeared as counsel for the plaintiffs and Messrs. A. L. Merrill and E. B. Smith, appeared for the defendants R. J. Reynolds Tobacco Company and R. L. Donnelly, Messrs. Black & Black appeared for the defendant Rulon D. Hair. After hearing argument of the respective counsel on the matter, the Court took the objections to the interrogatories under advisement.

The plaintiffs' motion to require the production of certain records and documents for the inspection

of the plaintiffs' counsel was taken under advisement by the Court after hearing arguments of counsel. [31]

[Title of Court and Cause.]

MINUTES OF THE COURT

March 23, 1943

Counsel for the respective parties being present, the Court announced his conclusions on the objections of the defendants to the interrogatories of the plaintiffs, and ordered as follows, to-wit:

As to interrogatories directed to the defendant, R. J. Reynolds Tobacco Company., the interrogatories numbered 3, 9, 13, 14, 15, 16, 21 and 22, the objections are sustained. The defendants' objections to all other interrogatories are overruled. The said defendant was given fifteen days in which to answer the same.

In interrogatories directed to the defendant L. R. Donnelly, interrogatories numbered 7, 9, 12, 19, 20, 23, 28, 29 and 30, the objections are sustained. The defendants' objections to all other interrogatories are overruled, and the said defendant was granted five days in which to answer the same.

In interrogatories directed to the defendant Rulon D. Hair, the interrogatories numbered 1, 3, 5, 17, 18, 25, 27 and 32, the objections are sustained. The defendant's objections to all other interrogatories are overruled, and the said defendant was given five days in which to answer the same.

The defendants asked and were granted excep-

tions to that portion of the order overruling objections.

The Court fixed 9:30 o'clock A. M. on March 24th, 1943, for disposition of the plaintiff's motion for an order requiring the defendants to produce certain records and documents, also for the resetting of the trial date for the cause. [32]

[Title of Court and Cause.]

MINUTES OF THE COURT

March 24, 1943

Comes now Messrs. Glenn A. Coughlin and B. W. Davis, counsel for the plaintiffs, with Messrs. Merrill & Merrill and E. B. Smith, attorneys for the defendants into court.

Whereupon the plaintiffs counsel waived all requirement of the defendants to answer the interrogatories issued by the plaintiffs and withdrew plaintiffs' motion to require the defendants to produce certain documents for the inspection of the plaintiffs.

The Court, thereupon, reset the cause for trial on March 29th, 1943, at 10 o'clock A. M. [33]

[Title of Court and Cause.]

MINUTES OF THE COURT

March 26, 1943

The plaintiffs' motion for leave to amend the complaint herein came on for hearing before the

Court. Counsel for the respective parties being present.

After hearing argument of B. W. Davis, Esquire, on the part of the plaintiff and A. L. Merrill, Esquire, on the part of the defendants, the Court took the motion under advisement. [34]

[Title of Court and Cause.]

MINUTES OF THE COURT

March 27, 1943

The Court announced his conclusions on the plaintiffs' petition to amend the complaint, and leave was granted to the plaintiff to make such amendment. The defendants asked and were granted exceptions.

The defendants were granted twenty days in which to answer the complaint as amended.

It was ordered that the setting of trial of the same be, and the same hereby is vacated, and the case is continued for the term.

[Title of Court and Cause.]

MINUTES OF THE COURT

March 30, 1943

The plaintiffs' notice of submitting proposed order, filed March 29th, 1943, was withdrawn by B. W. Davis, Esquire. [35]

[Title of Court and Cause.]

MOTION

Comes now the plaintiffs by and through their attorneys of record, and move the Court for an order permitting the filing of an amended complaint herein.

That said proposed amended complaint is attached hereto.

GLENN A. COUGHLAN

Res. & P. O. Address,

Montpelier, Idaho

B. W. DAVIS

Res. & P. O. Address,

Pocatello, Idaho.

Attorneys for Plaintiffs.

[Endorsed]: Filed April 5, 1943. [36]

[Title of Court and Cause.]

OBJECTIONS TO FILING
AMENDED COMPLAINT

Come now the R. J. Reynolds Tobacco Company and L. R. Donnelly, two of the above named defendants, and file herewith their objections to the Motion of the plaintiffs for an order permitting the filing of an amended complaint in the above entitled cause, upon the following grounds:

I.

That said motion comes too late in that after the filing of the original complaint these defendants filed a Motion to Dismiss and for a More Definite

Statement, which said Motion was argued and presented to the court and thereafter denied; that within the time prescribed by the court these defendants filed answer to plaintiff's complaint and said cause was set down for trial and that after the setting and before trial plaintiffs moved to amend said complaint by interlineation, substantially as set out in Paragraph VII of said proposed amended complaint, which amendment by interlineation was allowed by the court over the objections of these defendants.

II.

That there are no reasons proposed by the plaintiffs for seeking permission to file said amended complaint and that said Motion is unsupported by any statement or affidavit. [37]

III.

That the proposed amended complaint confuses the theory of the original complaint of attempted recovery under the Idaho Guest Statute by trying to insert into said action an additional theory of negligence and by so co-mingling said theories as to make wholly uncertain as to the basis of plaintiff's claim for relief.

IV.

That said proposed amended complaint fails to state a claim upon which relief can be granted.

Wherefore, these defendants pray as follows:

1. That said Motion to file said proposed amended complaint be denied.
2. That if said Motion be granted and said proposed amended complaint filed, then these defend-

ants further pray that they be permitted to file such motions or other responsive pleadings thereto as is permitted to an original complaint in the first instance, and that they be given such enlarged time to file such pleadings as this court shall allow.

E. B. SMITH

Residing at Boise, Idaho

A. L. MERRILL

Residing at Pocatello, Idaho

R. D. MERRILL

Residing at Pocatello, Idaho

Attorneys for above named

Defendants

(Affidavit of Service Attached)

[Endorsed]: Filed April 9, 1943. [38]

[Title of Court and Cause.]

OBJECTIONS TO FILING AMENDED
COMPLAINT

Comes now Rulon D. Hair, one of the above named defendants, and files herewith his objections to the Motion of the plaintiffs for an order permitting the filing of an amended complaint in the above entitled cause, upon the following grounds:

I

That said motion comes too late in that after the filing of the original complaint this defendant filed a Motion to Dismiss and for a More Definite Statement, which said Motion was argued and presented.

to the Court and thereafter denied; that within the time prescribed by the court this defendant filed answer to plaintiff's complaint and said cause was set down for trial and that after the setting and before trial plaintiffs moved to amend said complaint by interlineation, substantially as set out in Paragraph VII of said proposed amended complaint, which amendment by interlineation was allowed by the court over the objections of this defendant.

II

That there are no reasons proposed by the plaintiffs for seeking permission to file said amended complaint and that said Motion is unsupported by any statement or affidavit.

III

That said proposed amended complaint is an attempt to state an entirely new cause of action not stated in the original complaint and entirely change the cause of action against this defendant. [39]

IV.

That said proposed amended complaint fails to state a claim upon which relief can be granted against this defendant.

Wherefore, this defendant prays as follows:

1. That said Motion to file said proposed amended complaint be denied.
2. That if said Motion be granted and said proposed amended complaint filed, then this defendant

further prays that he be permitted to file such motion or other responsive pleading thereto as is permitted to an original complaint in the first instance and that he be given such enlarged time to file such pleading as to this court shall seem meet and just.

ROY L. BLACK

JOHN R. BLACK

Attorneys for Defendant,

Rulon D. Hair

Residing at Pocatello, Idaho.

(Affidavit of Service Attached)

[Endorsed]: Filed April 9, 1943. [40]

[Title of Court and Cause.]

MINUTES OF THE COURT

April 9, 1943

The plaintiffs' motion for leave to file an amended complaint was presented to the Court, together with the objections filed. It was ordered that the motion be, and the same hereby is granted and proposed amended complaint submitted with the motion be filed. The defendants were granted twenty days in which to plead. [41]

[Title of Court and Cause.]

AMENDED COMPLAINT

Comes now the plaintiffs and for a cause of action against the defendants, complain and allege:

I.

That George H. Newby is a widower, the surviving husband of Avenell Newby, and the father of Richard Arlen Newby, age eight years and Patty Ann Newby, age six years, the minor children of Avenell Newby, deceased and the plaintiff; that he was, on the 28th day of September, 1942, by order of the District Court of the Fifth Judicial District of the State of Idaho in and for the County of Bear Lake, duly made and entered, duly and regularly appointed guardian ad litem for said Richard Arlen Newby, and Patty Ann Newby, with authority to institute, maintain and conclude this suit. That the said George H. Newby, Richard Arlen Newby and Patty Ann Newby, minors, are the sole and only heirs at law of the said Avenell Newby, deceased.

II.

That the R. J. Reynolds Tobacco Company for several years immediately prior to the filing of this complaint, has been and now is a corporation organized and existing under the laws of the State of North Carolina and doing business in the State of Idaho as a foreign corporation without having

complied with the laws of Idaho relating to foreign corporations qualifying to do business in said State.

III.

That at all times hereinafter mentioned the defendant, L. R. Donnelly, was a citizen and resident of the State of Utah with his place of business and residence in Salt Lake City, State of Utah. [42]

IV.

That on the 11th day of September, 1942 and at the time of the filing of plaintiffs' complaint in the District Court of the County of Bear Lake, Idaho, on or about the 28th day of September, 1943, the defendant, Rulon D. Hair was a citizen and a resident of the State of Idaho.

V.

That the defendant, Rulon D. Hair, at all times hereinafter mentioned was the duly authorized agent, servant and employee of the defendant, R. J. Reynolds Tobacco Company, and the defendant, L. R. Donnelly and was at all times hereinafter mentioned engaged in the course, scope and line of his business for the above mentioned defendants, R. J. Reynolds Tobacco Company and L. R. Donnelly.

VI.

That at all times hereinafter mentioned the defendants, R. J. Reynolds Tobacco Company and L. R. Donnelly, were the owners of and furnished to the defendant, Rulon D. Hair, a Chevrolet Panel

Truck, bearing State of Idaho truck license 3A-150, which was used by said Hair in the prosecution of the business of said defendants in the line, course, and scope of the employment of said Hair as an employee of said defendants.

VII.

That at all times herein mentioned the said defendant, Rulon D. Hair had permission and authority from the said R. J. Reynolds Tobacco Company and L. R. Donnelly, to use and operate said Chevrolet Panel truck upon the public highways of the State of Idaho, notwithstanding that at all of said times the said Tobacco Company and Donnelly knew that Rulon D. Hair was a careless, reckless and incompetent driver of an automobile and was in the habit of hauling guests contrary to instruction. [43]

VIII.

That on the 11th day of September, 1942, on the public highway known as U. S. Highway No. 30 North, at a point on said highway about seventeen miles north of Montpelier, Idaho, the said Rulon D. Hair, with a reckless disregard of the rights of others and of Avenell Newby, so recklessly drove and operated the said panel truck hereinabove referred to that the same ran off the said highway, tipped over and inflicted serious injuries upon said Avenell Newby from which she died on the 16th day of September, 1942, and at said time and place said Avenell Newby was riding with Rulon D. Hair as his guest and was a guest of the defendants herein.

IX.

That the said Avenell Newby was of the age of twenty-eight years; was a strong, healthy women, capable of making a home and doing the housework for the plaintiff, George H. Newby and their minor children, Richard Arlen Newby and Patty Ann Newby, had she lived. That she was a kind and friendly person and was devoted to her family. That the minor children were dependent upon her for their care and guidance. That by reason of her death, her husband, George H. Newby, has lost the love, comfort and companionship of a devoted wife. That the minor children, Richard Arlen Newby and Patty Ann Newby have lost the love, comfort and care and companionship that only their mother could give, to the damage of the said George H. Newby and Richard Arlen Newby and Patty Ann Newby, in the sum of \$100,000. That by reason of the injuries resulting in the death of the deceased, Avenell Newby, expenses were incurred for medical services in the amount of \$115.00, and for funeral and burial services in the amount of \$268.20.

Wherefore, the plaintiff, George H. Newby on his own behalf and as guardian ad litem for Richard Arlen Newby and Patty Ann Newby, prays for damages against the defendants and each of them for the amount of One Hundred Thousand Dollars general damages, [44] and \$115.00 for medical services and \$268.20 funeral and burial expenses; for their costs of suit herein expended and for such other and

further relief as may be found just and equitable in the premises.

GLENN A. COUGHLAN

Res. & P.O. Address: Montpelier, Idaho

B. W. DAVIS

Res. & P.O. Address: Pocatello, Idaho

Attorneys for Plaintiffs.

[Endorsed]: Filed April 9, 1943. [45]

[Title of Court and Cause.]

**MOTION TO DISMISS, MOTION FOR MORE
DEFINITE STATEMENT, AND MOTION
TO STRIKE DIRECTED TO AMENDED
COMPLAINT**

Come now defendants R. J. Reynolds Tobacco Company and L. R. Donnelly, and each of them, and moves the court as follows:

1. To dismiss the action because the amended complaint fails to state a claim against these defendants or either of them upon which relief can be granted;

2. To dismiss the action because the amended complaint shows upon its face lack of jurisdiction of the court over the persons of Richard Arlen Newby and Patty Ann Newby, minors, and each of them, because (a) there is no general guardian who appears for or on behalf of either of said minors, (b)

there is no guardian ad litem appointed pursuant to Rule 9 and 58 of the Rules of the Practice of the United States District Court for the District of Idaho, and George H. Newby, who purports to appear as guardian ad litem for said minors is not qualified, pursuant to the rules aforesaid, to act in such capacity.

3. Without waiving the foregoing motions, but expressly relying thereon, these defendants and each of them, further moves the court to require plaintiffs to make a more definite statement of their purported cause of action as follows: [46]

(a) State what relationship plaintiffs will contend existed between R. J. Reynolds Tobacco Company and L. R. Donnelly and the manner in which and the reason for Rulon D. Hair acting as agent of both of said defendants at the times and in the manner alleged in Paragraph V of said amended complaint, and more particularly what type of service it will be contended said Rulon D. Hair was rendering that would enable him to act within the course, scope and line of business or claimed agency of said defendants, either jointly or severally, at the times mentioned in said amended complaint;

(b) State what particular acts referred to in Paragraph VII of said amended complaint which it is inferred were committed by Rulon D. Hair and the times of their commission and the character thereof, and which plaintiffs contend came to the knowledge of R. J. Reynolds Tobacco Company and L. R. Donnelly by virtue whereof plaintiffs claim these defendants, and each of them, knew that Hair

was a careless, reckless and incompetent driver of an automobile; also the particular "instructions" which it is alleged were violated in the charge that Rulon D. Hair was in the habit of hauling guests;

(c) State the particular acts which plaintiffs will contend constituted a reckless disregard of the rights of others and of Avenell Newby, and the acts which plaintiffs will contend constituted reckless driving and operation of said panel truck as alleged, and at the time alleged, in Paragraph VIII of said complaint.

4. Upon the ground that the same is immaterial, these defendants move to strike from said amended complaint the following:

(a) All that portion of Paragraph numbered II reading as follows: [47]

"and doing business in the state of Idaho as a foreign corporation without having complied with the laws of Idaho relating to foreign corporations qualified to do business in said state."

(b) All that portion of Paragraph numbered VII reading as follows:

"Notwithstanding that at all of said times the said Tobacco Company and Donnelly knew that Rulon D. Hair was a careless, reckless and incompetent driver of an automobile and was in the habit of hauling guests contrary to instructions."

These motions are made individually and separately but consolidated pursuant to Rule 12 (g).

Wherefore, defendants pray said motions and each of them be granted and said defendants be given the relief sought thereby.

E. B. SMITH

Residing at Boise, Idaho

A. L. MERRILL

Residing at Pocatello, Idaho

R. D. MERRILL

Residing at Pocatello, Idaho

Attorneys For Defendants

R. J. Reynolds Tobacco

Co., And L. R. Donnelly

(Service Acknowledged)

[Endorsed]: Filed April 26, 1943. [48]

[Title of Court and Cause.]

MOTION TO DISMISS, MOTION FOR MORE
DEFINITE STATEMENT, DIRECTED TO
AMENDED COMPLAINT.

Comes now defendant Rulon D. Hair, and moves the court as follows:

1. To dismiss the action because the amended complaint fails to state a claim against this defendant upon which relief can be granted;

2. To dismiss the action because the amended complaint shows upon its face lack of jurisdiction of the court over the persons of Richard Arlen Newby and Patty Ann Newby, minors, and each of them, because (a) there is no general guardian who ap-

pears for or on behalf of either of said minors, (b) there is no guardian ad litem appointed pursuant to Rule 9 and 59 of the Rules of the Practice of the United States District Court for the District of Idaho, and George H. Newby, who purports to appear as guardian ad litem for said minors is not qualified, pursuant to the rules aforesaid, to act in such capacity;

3. Without waiving the foregoing motions, but expressly relying thereon, this defendant further moves this court to require plaintiffs to make more definite statement of their purported cause of action as follows:

(a) State what particular acts referred to in paragraph 7 of said Amended Complaint which it is inferred were committed by this defendant, Rulon D. Hair, and the times of their commission and the character thereof which it is alleged constitute careless, reckless and incompetent driving [49] of an automobile; and state at what times and on what occasions it is going to be contended this defendant hauled guests contrary to instructions also set forth what instructions are claimed to be referred to that the acts of this defendant were contrary to.

(b) State the particular acts which plaintiffs will contend constituted a reckless disregard of the rights of others and of Avenell Newby, and the acts which plaintiffs will contend constituted reckless driving and operation of said panel truck as alleged, and at the time alleged, in Paragraph VIII of said complaint.

These motions are made individually and separately but consolidated pursuant to Rule 12 (g).

Wherefore, this defendant prays said motions and each of them be granted and said defendant be given the relief sought thereby.

ROY L. BLACK

JOHN R. BLACK

Attorneys For Defendant, Ru-
lon D. Hair. Residing at
Pocatello, Idaho.

(Service Acknowledged)

[Endorsed]: Filed April 28, 1943. [50]

[Title of Court and Cause.]

ORDER

On April 26, 1943, defendants R. J. Reynolds Tobacco Company and L. R. Donnelly, filed their motion to dismiss; motion for more definite statement and motion to strike, directed to the amended complaint.

The matter was fully presented by briefs, filed by respective counsel, and the Court being advised, it is Ordered that:

The motion to dismiss is denied.

The motion for more definite statement is denied.

The motion to strike is sustained as to the following portion of paragraph II of the amended complaint: "without having complied with the laws of Idaho relating to foreign corporations qualified to

do business in said state." As to all other portions the motion is denied.

Dated this 6th day of July 1943.

CHASE A. CLARK

United States District Judge.

[Endorsed]: Filed July 6, 1943. [51]

[Title of Court and Cause.]

ORDER

On April 28, 1943 defendant Rulon D. Hair filed his motion to dismiss and motion for more definite statement, directed to the Amended Complaint.

The matter was submitted and fully considered and the Court being advised, it is Ordered that:

The motion to dismiss be and the same is denied.

The motion for more definite statement be and the same is denied.

Dated this 6th day of July 1943.

CHASE A. CLARK

United States District Judge.

[Endorsed]: Filed July 6, 1943. [52]

[Title of Court and Cause.]

ANSWER OF R. J. REYNOLDS TOBACCO
COMPANY and L. R. DONNELLY TO
AMENDED COMPLAINT.

Come now R. J. Reynolds Tobacco Company and L. R. Donnelly, two of the defendants in the above-

entitled cause, and, for answer to the complaint of the plaintiffs on file herein, admit, deny and allege as follows:

FIRST DEFENSE

That the amended complaint fails to state a claim against these answering defendants, or either of them, upon which relief can be granted.

SECOND DEFENSE

I.

These defendants deny each and every allegation of said amended complaint not hereinafter specifically admitted.

II.

Answering paragraph numbered I of said amended complaint, these defendants admit the allegations contained therein, save and except defendants deny that George H. Newby was duly and regularly appointed guardian ad litem for Richard Arlen Newby and Patty Ann Newby, and denies the legal effect alleged of the order pleaded in said paragraph. [53]

III.

Answering paragraph numbered II of said amended complaint, these defendants admit that the R. J. Reynolds Tobacco Company for several years immediately prior to the filing of said complaint has been, and that it now is, a corporation organized and existing under the laws of the State of North Carolina, but deny the remaining allegations of said paragraph.

IV.

These defendants admit the allegations contained in paragraph numbered III of said amended complaint.

V.

Answering paragraph numbered IV of said amended complaint, these defendants deny the allegations contained therein, and allege in this respect that on the date of the filing of the original complaint in the District Court of Bear Lake County, State of Idaho, to wit: on or about the 28th day of September, 1942, the defendant Rulon D. Hair was, and for some time prior thereto had been, and now is, a bona fide resident and citizen of the State of Utah.

VI.

Answering paragraph numbered V of said amended complaint, these defendants deny each and every allegation contained therein. Further answering said paragraph, defendants allege that the said Rulon D. Hair had been acting as a salesman for the R. J. Reynolds Tobacco Company prior to the 11th day of September, 1942, but was not so acting on said date and was not acting as an agent, servant or employee of these defendants or either of them, or in any other capacity, with reference to any of the matters or things alleged in said amended complaint, and none of said alleged acts were committed by the said Rulon D. Hair within the course, scope or line of any agency, business or employment by or for the R. J. Reynolds Tobacco Company or L. R. Donnelly, and for which acts, if any were committed,

neither the said R. J. Reynolds tobacco [54] Company or the said L. R. Donnelly are in anywise liable.

VII.

Answering paragraph numbered VI of said amended complaint, these defendants deny each and every allegation contained therein. Further answering said paragraph, however, defendants allege that the Chevrolet Panel Truck therein described was the property of R. J. Reynolds Tobacco Company, but that it was not used by the said Rulon D. Hair at the time of the matters and things alleged in said complaint in the prosecution of any business or agency of these answering defendants or either of them, or as agent, servant or employee of either of said defendants, and its use at such time and for the purposes alleged in said complaint was without right or permission of these answering defendants, and they are in no wise responsible for any damages, if any occurred, as the result thereof.

VIII.

Answering paragraph numbered VII of said amended complaint, these defendants admit that Rulon D. Hair had permission and authority to use and operate said Chevrolet Panel Truck when actually engaged in the business of the company, but deny that he was so engaged on the 11th day of September, 1942, and deny that these defendants, or either of them, knew that the said Rulon D. Hair was a careless, reckless or incompetent driver of an automobile or that he was in the habit of hauling

guests in said car. In this respect defendants further deny that the said Rulon D. Hair was a careless, reckless or incompetent driver of an automobile, and deny that he hauled guests therein. These defendants allege that the said Rulon D. Hair had been given instructions not to haul or carry guests in said automobile or panel truck, and further allege that if there has been an infraction of this instruction, the same was without the knowledge or consent of these answering defendants or either of them. Defendants deny each and every other allegation contained in said paragraph. [55]

IX.

Answering paragraph numbered VIII of said amended complaint, these defendants admit that on the 11th day of September, 1942 on a public highway, known as U. S. Highway #30 North, at a point on said highway about 17 miles north of Montpelier, Idaho, the defendant Rulon D. Hair, while driving said Panel Truck, ran off the highway, tipped over, and that certain injuries were inflicted upon Avanell Newby, and admits that Avanell Newby died on the 16th day of September, 1942, but deny each and every other other allegation contained in said paragraph. Further answering said paragraph, these defendants allege that if the said Avanell Newby was riding in said Panel Truck as the guest of Rulon D. Hair or with his consent, the same was without the consent or permission of these answering defendants or either of them, and contrary to positive instructions theretofore given the said Rulon

D. Hair, and if the said Rulon D. Hair transported the said Avanell Newby in said Panel Truck as a guest or otherwise, the same was without authority of these defendants, and without the scope of his employment, and for the consequence of which neither of these answering defendants are liable.

X.

Answering paragraph numbered IX of said amended complaint, these defendants admit that Avanell Newby was of the approximate age of 28 years. Defendants deny that by reason of her death the plaintiffs have been damaged in any sum or amount whatever, by reason of any act or omission on the part of these defendants or either of them. Defendants are without knowledge or information sufficient to form a belief as to the remaining allegations of said paragraph, and upon this ground deny each and every other allegation contained therein. [56]

THIRD DEFENSE

Further answering said amended complaint, and as an additional defense thereto, these defendants allege that any injuries which the said Avanell Newby may have received in the accident described in the amended complaint and the damages to the plaintiffs, if any, resulting therefrom were proximately caused or contributed to by the negligence and carelessness of the said Avanell Newby, who was then and there guilty of contributory negligence, and said injuries were not the result of negligence or want of care on the part of any of the defendants charged in said amended complaint.

FOURTH DEFENSE

Further answering said amended complaint, and as a separate and further affirmative defense thereto, these defendants allege that at the time and place mentioned in said amended complaint the said Avannell Newby was, and for some time prior thereto had been, riding in said panel truck as a gratuitous guest of Rulon D. Hair and at her special request; that she had been with the said Rulon D. Hair for a number of hours prior to said accident and all matters and things touching said association and the operation of said panel truck by the said Rulon D. Hair were fully known to her and freely acquiesced in by her, and having such information she continued to ride in said panel truck and acquiesced in each and everything done with respect thereto, and of said association, and the driving of said panel truck, and with such knowledge and acquiescence on her part and the riding in said truck with the said Rulon D. Hair at her own request and as his gratuitous guest she thereby assumed all risk attendant thereon and by reason of her acquiescence and of her own conduct no recovery can be had for any damages, if any, which may have resulted from the accident alleged in said amended complaint.

FIFTH DEFENSE

Further answering said amended complaint and as a separate [57] and further affirmative defense thereto, these defendants allege that the injuries which Avannell Newby may have sustained, and the

damages thereby suffered, if any, by the plaintiffs were the result of matters and things over which the driver of said automobile had no control, and said accident occurred without fault on his part and without fault, liability or responsibility of any kind whatever on the part of these answering defendants.

Wherefore, these defendants pray that plaintiffs take nothing by reason thereof, and that defendants recover their costs incurred herein.

E. B. SMITH

Residing at Boise, Idaho

A. L. MERRILL

Residing at Pocatello, Idaho

R. D. MERRILL

Residing at Pocatello, Idaho

Attorneys for R. J. Reynolds Tobacco Company
and L. R. Donnelly

(Duly verified.) [58]

The defendants, R. J. Reynolds Tobacco Company and L. R. Donnelly, hereby demand a trial by jury.

E. B. SMITH

A. L. MERRILL

R. D. MERRILL

Attorneys for Defendants
R. J. Reynolds Tobacco
Company & L. R. Donnelly.

(Service Acknowledged.)

[Endorsed]: Filed July 15, 1943. [59]

[Title of Court and Cause.]

ANSWER OF DEFENDANT RULON D. HAIR

Comes now the defendant Rulon D. Hair and for answer to plaintiffs' Amended complaint this defendant admits, denies and alleges as follows:

I

That said amended complaint fails to state a claim or cause of action against this answering defendant upon which relief can be granted to plaintiffs or either of any of them.

SECOND DEFENSE.

I

This defendant denies each and every allegation of said complaint not herein specifically admitted.

II

Answering paragraph I of the Amended Complaint this defendant admits the allegations thereof.

III

Answering paragraph II of the amended complaint this defendant admits that defendant R. J. Reynolds Tobacco Company, for several years immediately prior to the filing of this amended complaint, has been and now is a corporation but denies each and every other allegation of said paragraph II.

IV

Answering paragraph III of the amended complaint this defendant admits the allegations thereof.

V

Answering paragraph IV of said amended complaint this defendant denies [60] each and every allegation thereof and further answering said paragraph IV of said amended complaint this defendant alleges the fact to be that at the time of the filing of the complaint herein this defendant was and ever since said time has been and now is a citizen of and a resident of the State of Utah.

VI

Answering paragraph V of said amended complaint this defendant admits that prior to the accident mentioned in the complaint he had been an employee of the said defendant R. J. Reynolds Tobacco Company, a corporation, as a salesman, and this defendant denies each and every other allegation of said paragraph.

VII

Answering paragraph VI of said amended complaint this defendant admits that at the times mentioned in the amended complaint defendant R. J. Reynolds Tobacco Company furnished to this defendant a Chevrolet Panel Truck, bearing State of Idaho Truck License #3A-150 which was used by this defendant in the prosecution of his business and in his capacity as employee and salesman for said defendant R. J. Reynolds Tobacco Company and defendant denies each and every other allegation of said paragraph VI.

VIII

Answering paragraph VII of said complaint this defendant admits that at the times herein mentioned he had permission and authority from the defendant R. J. Reynolds Tobacco Company to use and operate said Chevrolet Panel Truck upon the public highways of the State of Idaho in the carrying on of his business as employee and salesman for said defendant R. J. Reynolds Tobacco Company and this defendant denies that this defendant was a careless, [61] or that he was a reckless or that he was an incompetent driver of an automobile and denies each and every other allegation of said paragraph.

IX

Answering paragraph VIII of said amended complaint this defendant admits that on to-wit: The 11th day of September, 1942, on the public highway known as U. S. Highway #30 N at a point about seventeen miles north of Montpelier, Idaho, the said truck, ran off the said highway, tipped over and inflicted injuries upon said Avaneil Newby and that at said time and place said Avaneil Newby was riding with this defendant but denies each and every other allegation of said paragraph.

Further answering said allegations defendant alleges that said Avaneil Newby was riding in said truck with said defendant at her own request and instance and without any invitation from this defendant and said Avaneil Newby having requested the defendant to permit her to ride with him to Montpelier, Idaho and that she was so riding with

the defendant at the time of the said accident alleged in the amended complaint.

X

Answering paragraph IX of said amended complaint this defendant admits that the said AvaneU Newby was of about the age of 28 years; denies each and every other allegation of said paragraph IX; this defendant specifically denies that said George H. Newby, Richard Arlen Newby and Patty Ann Newby have been damaged in any sum or amount whatever by reason of any act or omission on the part of this defendant.

THIRD DEFENSE.

Further answering said Amended Complaint and as an additional defense thereto this defendant alleges:

I

That any injuries which the said AvaneU Newby may have received in the accident described in the Amended Complaint and the damages to plaintiffs, if any, resulting therefrom, were proximately caused or contributed to by the negligence of said AvaneU Newby who was then and there guilty of contributory negligence and that the said injuries were not the result of [62] negligence or want of care on the part of this defendant.

FOURTH DEFENSE.

Further answering the said Amended Complaint and as a further, separate and affirmative defense thereto this defendant alleges:

That at the time and place mentioned in said amended complaint the said Avanell Newby was, and for some time prior thereto had been, riding in said automobile with this defendant as a gratuitous guest of this defendant and solely at and by her own request, and that all matters and things touching said truck and the operation of said truck or automobile by this defendant, as the same was being operated, were fully known to the said Avanell Newby, and, having such information, she continued to ride in said automobile truck and acquiesced in and joined with this defendant in each and everything done with respect thereto, and with respect to the driving of the said automobile as then being driven by this defendant and with such knowledge and acquiescence and her riding in said automobile truck with this defendant solely at her own request and instance and as a gratuitous guest, she thereby assumed all risk attendant thereon and by reason whereby no recovery can be had for any damages, if any, which may have resulted to her or to any of the plaintiffs from the said accident alleged in the amended complaint.

FIFTH DEFENSE:

Further answering said Amended Complaint and as a further defense thereto this defendant alleges that the injuries which the said Avanell Newby may have sustained and any damages suffered by the plaintiffs herein, were the result of matters and things over which this defendant had no control and the said accident occurred without fault, without

carelessness and without negligence on the part of this defendant.

Wherefore, having fully answered said Amended Complaint this defendant prays that plaintiff take nothing by reason thereof and this defendant recover his costs incurred herein.

ROY L. BLACK

JOHN R. BLACK

Attorneys for Defendant Rulon D. Hair. Residence: Pocatello, Idaho. [63]

Defendant Rulon D. Hair hereby demands a trial by jury.

ROY L. BLACK

JOHN R. BLACK

Attorneys for Defendant, Rulon D. Hair, Residence; Pocatello, Idaho.

(Duly verified.)

(Service Acknowledged)

[Endorsed]: Filed July 15, 1943. [64]

[Title of Court and Cause.]

MINUTES OF THE COURT

August 18, 1943

The plaintiffs' Motion to Strike from the Answers of the several defendants and all objections to interrogatories by the respective parties came on for

hearing before the Court. Glenn A. Coughlan, Esquire, appeared as counsel for the plaintiffs and E. B. Smith, Esquire, appeared for all the defendants except Rulon D. Hair.

On Motion by plaintiffs' counsel and with consent of counsel for the defendants, the Court granted leave to amend the Motion to Strike by interlineation.

On stipulation of counsel the Motions as regard to the defendant Rulon D. Hair, were submitted without argument.

The Court heard argument of respective counsel on the Motion to Strike from the Answer of the defendants R. J. Reynolds Tobacco Co. and L. R. Donnelly, and also the objection to interrogatories and took the same under advisement.

The Court ordered that all interrogatories, that may be sustained by the Court, be answered by the respective parties to whom they are directed by September 15, 1943. [65]

[Title of Court and Cause.]

MOTION TO REQUIRE PLAINTIFFS TO ELECT, AND TO STRIKE

Comes now R. J. Reynolds Tobacco Company and L. R. Donnelly, two of the defendants above named, and move the Court as follows:

I.

That plaintiffs be required to elect upon which theory they intend to rely for a verdict in this case, that is to say:

(a) Whether they intend to rely upon claimed negligence of the defendants R. J. Reynolds Tobacco Co. and L. R. Donnelly in allegedly permitting Rulon D. Hair to use and operate the Chevrolet Panel truck, under the claimed circumstances as alleged by plaintiffs in paragraph VII of their Amended Complaint, or

(b) Whether they intend to rely upon the theory, that Avenell Newby was riding as a guest with Rulon D. Hair at the time of the accident, as alleged by plaintiffs in paragraph VIII of said Amended Complaint, governed and controlled by I.C.A. sec. 48-901, as amended by Ida. Sess. Laws 1939, Chap. 160, P. 285-286, the so-called Guest Statute.

II.

To strike from said amended complaint all allegations tending to support the theory not elected by plaintiffs. [66]

Dated October 20, 1943.

A. L. MERRILL

R. D. MERRILL

Residing at Pocatello, Idaho

E. B. SMITH

Residing at Boise, Idaho

Attorneys For The Defendants R. J. Reynolds Tobacco Company And L. R. Donnelly.

(Service Acknowledged)

[Endorsed]: Filed Oct. 20, 1943. [67]

[Title of Court and Cause.]

MOTION TO REQUIRE PLAINTIFFS TO
ELECT AND TO STRIKE

Comes now Rulon D. Hair, one of the defendants above named, and moves the court, as follows:

I

That plaintiffs be required to elect upon which theory they intend to rely for a verdict in this case, that is to say:

a. Whether they intend to rely upon the alleged negligence of this defendant, Rulon D. Hair, or

b. Whether they intend to rely upon the theory that Avenell Newby was riding as a guest with Rulon D. Hair at the time of the accident as alleged in paragraph 8 of the amended complaint governed and controlled by I.C.A. Section 48-901 as amended by Idaho Session Laws 1939 Chapter 160, Page 285-6, the so-called Guest Statute.

II

To strike from said amended complaint all allegations tending to support the theory not elected by plaintiffs.

Dated October 20, 1943.

ROY L. BLACK &
JOHN R. BLACK

Residing at Pocatello, Idaho,
Attorneys for said defendant
Rulon D. Hair

(Service Acknowledged)

[Endorsed]: Filed Oct. 20, 1943. [68]

[Title of Court and Cause.]

MINUTES OF THE COURT

October 20, 1943

This cause came on for trial before the Court and a jury, Messrs. B. W. Davis and Glenn A. Coughlan appearing for the plaintiffs; and Messrs. A. L. Merrill and E. B. Smith appearing for the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly, and R. L. Black for the defendant Rulon D. Hair.

Motions on the part of all defendants to require the plaintiffs to elect were presented by the defendants' counsel, and were by the Court denied.

The Clerk, under directions of the Court, proceeded to draw from the jury box the names of twelve persons, one at a time, written on separate slips of paper, to secure a jury. Mrs. Jessie Finlayson, Mrs. Grace Keppner, Leonard Bjorkman, O. M. Hess, and George E. Gibby, whose names were drawn, were excused for cause; and Mrs. Alma

Rudd and Ross L. Holcomb whose names were also drawn, were excused on the defendants' peremptory challenge.

Following are the names of the persons whose names were drawn from the jury box, who were sworn and examined on voir dire found duly qualified, and who were sworn to well and truly try said cause and a true verdict render, to-wit:

Olive Kelly

George Ball

Abner Widdison

Merle Miller

George Rinehart

Joseph N. Arbon

Talmadge Mickelson

Lloyd B. Robinett

Mrs. Clara Butler

W. O. Creer

Elmer Christensen

Nellie Garretson

After a statement of the plaintiffs' cause by their counsel, Mike McGuire and A. P. Brunderson were sworn and examined as witnesses on the part of the plaintiffs.

After admonishing the jury, the Court excused them to 10 o'clock A. M., on Thursday, October 21, 1943, and continued the trial to that time. [69]

[Title of Court and Cause.]

MINUTES OF THE COURT

October 21, 1943

The trial of this cause was resumed before the Court and jury. Counsel for the respective parties being present, it was agreed that members of the jury were all present.

A. P. Bunderson was recalled and further examined and Dr. R. B. Lindsay, George H. Newby, Rosetta Tuescher, Sid Case, Martin Manly, F. H. Smullen, and Dan Buster were sworn and examined as witnesses on the part of the plaintiff; and L. R. Donnelly and R. D. Hair were called for cross-examination, and were sworn and cross-examined by the plaintiff.

Documentary evidence was introduced on the part of both the plaintiffs and defendants.

After admonishing the jury, the Court excused them to 10 o'clock A. M., on October 22, 1943, and continued the trial to that time. [70]

[Title of Court and Cause.]

MINUTES OF THE COURT

October 22, 1943

The trial of this cause was resumed before the Court and jury. Counsel for the respective parties being present, it was agreed that the members of the jury were all present.

Wesley Tucher and Calvin Tucher were sworn and examined as witnesses, and the cross-examina-

tion in the deposition of the witness E. A. Darr was read in evidence on the part of the plaintiffs. The direct evidence of said witness was read in evidence on the part of the defendants, and documentary evidence was introduced on the part both of the plaintiffs and of the defendants, and here the plaintiffs rest.

Counsel for the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly, moved the Court to strike from the record the oral testimony of the witness Sid Close, which Motion was granted by the Court.

After a statement of the defense by counsel for the respective defendants Rulon D. Hair, Carl Oxenbine and Jack Perkins were sworn and examined, and L. R. Donnelly was recalled and examined as witnesses on the part of the defendants.

The deposition of Durwood Perkins, a witness on the part of the defendants, was read in evidence and documentary evidence was introduced on the part of both the plaintiffs and defendants, and here both sides close.

The plaintiffs' counsel moved the Court to restore to the record the testimony of the witness Sid Close. The Motion was denied by the Court.

Counsel for the respective defendants moved the Court to instruct the jury to return a verdict in favor of the defendants. The Court took the Motions under advisement.

After admonishing the jury, the Court excused them to 10 o'clock A. M. on October 23, 1943, and continued the trial to that time. [71]

[Title of Court and Cause.]

VERDICT

We, the jury in the above entitled cause, find for the plaintiffs, and against the defendants R. J. Reynolds Tobacco Company, L. R. Donnelly, and Rulon D. Hair, and fix plaintiffs' damages against said defendants at the sum of \$7500.00.

MERLE A. MILLER

Foreman

[Endorsed]: Filed Oct. 23, 1943. [72]

[Title of Court and Cause.]

MINUTES OF THE COURT

October 23, 1943

This cause came on for further trial before the Court and jury. Counsel for the respective parties being present, it was agreed that the members of the jury were all present.

The Court announced his conclusions on the defendants' Motion for an instructed verdict, and denied the same.

The cause was argued before the jury by counsel, for the respective parties, after which the Court instructed the jury and placed them in charge of a bailiff duly sworn, and they retired to consider of their verdict. Counsel for the respective defendants excepted the instructions of the Court to the jury.

On the same day the jury returned into Court,

counsel for respective parties being present, whereupon the jury presented their written verdict, which was in the words following:

[Title of Court and Cause.]

VERDICT

“We, the jury in the above entitled cause, find for the plaintiffs, and against the defendants R. J. Reynolds Tobacco Company, L. R. Donnelly, and Rulon D. Hair, and fix plaintiffs’ damages against said defendants at the sum of \$7500.00.

MERLE A. MILLER,
Foreman.”

The verdict was recorded in the presence of the jury and then read to them, and they each confirmed the same.

Exception to the verdict was taken by counsel on the part of each individual defendant. [73]

In the District Court of the United States, In and
For the District of Idaho, Eastern Division

No. 1196

GEORGE H. NEWBY, in his own behalf; RICH-
ARD ARLEN NEWBY, and PATTY ANN
NEWBY, both minors, by their Guardian Ad
Litem, GEORGE H. NEWBY,

Plaintiffs,

vs.

R. J. REYNOLDS TOBACCO COMPANY, L. R.
DONNELLY and RULON D. HAIR,

Defendants.

JUDGMENT ON VERDICT

This matter having come on regularly for trial to
a jury which has returned its verdict herein.

Now, Therefore, It Is Ordered, Adjudged, and
Decreed, That plaintiffs have and recover of and
from the said defendants, jointly and severally, the
sum of Seven Thousand Five Hundred Dollars
(\$7,500.00) damages, together with plaintiffs' costs
and disbursements incurred herein assessed in the
sum of \$89.40.

Witness, The Honorable Chase A. Clark, Judge
of the above entitled Court, and the seal thereof,
this 23rd day of October, 1943.

W. D. McREYNOLDS

[Seal]

Clerk

[Endorsed]: Filed Oct. 23, 1943. [74]

[Title of Court and Cause.]

PETITION ON MOTION FOR JUDGMENT
NOTWITHSTANDING VERDICT AND, IN
THE ALTERNATIVE, FOR A NEW TRIAL

Come Now R. J. Reynolds Tobacco Company and L. R. Donnelly, two of the above named defendants, and move the court to set aside the verdict and judgment entered thereon, and enter judgment in their favor notwithstanding the verdict in accordance with the motion made by said defendants for a directed verdict which motion was made by said defendants at the conclusion of all the evidence, and is summarized as follows:

(a) That the evidence is wholly insufficient to support a verdict for the plaintiffs and against these defendants, more particularly because said evidence failed to show that Rulon D. Hair, at the time of said accident and for a number of hours theretofore, was acting as an agent or employee of said defendants, or either of them, or at the time of said accident was acting within the scope of his employment or doing anything in the furtherance of his employer's business, but on the contrary the evidence conclusively shows that at the time of said accident and for a number of hours theretofore the said Rulon D. Hair was on a pleasure party of his own and was not acting for said defendants, or either of them, nor within the scope of his employment; (b) that the evidence conclusively shows that Avenell Newby was riding in the automobile involved in said accident as a gratuitous guest of [75] Rulon D. Hair, and that Rulon D. Hair, at said time, had no au-

thority of any kind or character from either R. J. Reynolds Tobacco Company or L. R. Donnelly to haul guests in said car, but on the contrary was under positive written and oral instructions to never, at any time, permit any one to ride in said car except an employee of the company, and in hauling Avenell Newby he was acting entirely without the scope of his employment.

(c) That the evidence was wholly insufficient to show either that Rulon D. Hair was a careless, reckless or incompetent driver or that the said R. J. Reynolds Tobacco Company or L. R. Donnelly knew or had reason to know that the said Rulon D. Hair was a careless or reckless or incompetent driver.

(d) That the evidence failed to show that, at the time of said accident, the said Rulon D. Hair was in any way guilty of violating the gratuitous guest statute of the state of Idaho or that he was guilty of reckless disregard of the rights of Avenell Newby. That at the time of said accident and for some time prior thereto, the said Avenell Newby was riding in said automobile as a guest of Rulon D. Hair, and at her instance and request; that immediately prior to said accident she was in a position to be as observant of all surrounding conditions and of all acts or omissions, if any, on the part of the said Hair as was Hair himself; that she was conscious and could observe the acts of the defendant in the operation of said automobile, but that she made no protests or objections to anything done or omitted by the said Rulon D. Hair, but acquiesced in his conduct and in the operation of said automobile.

(e) That the evidence introduced and admitted

for the purpose of showing Rulon D. Hair to be a careless, reckless or incompetent driver was wholly and completely insufficient as matter of law to establish the status of incompetency or carelessness or recklessness on the part of said Rulon D. Hair. [76]

Said defendants refer to the motion as made in open court and as the same appears in the notes of the Reporter for full particulars.

In the event of a failure of the court to grant said motion for judgment notwithstanding the verdict, then said defendants move for an order setting aside the verdict and judgment rendered herein and granting a new trial pursuant to Rule 50 of the Rules of Federal Procedure, and the Rules of this court, upon the following grounds:

I.

Insufficiency of the evidence to justify the decision or verdict, and that it is against the law in this, to-wit:

(a) The evidence fails to show that at the time of the accident in which Avenell Newby was injured, the said Rulon D. Hair was acting as an agent, servant or employee of these defendants, or either of them, but on the contrary the evidence conclusively proves that at said time and for approximately eighteen hours theretofore the said Rulon D. Hair was not acting as such agent, servant or employee, nor within the scope of any employment of these defendants, or either of them, but on the contrary was engaged entirely with the said Avenell Newby on a pleasure party involving only the interests of the said Rulon D. Hair and Avenell Newby. That the presumption, if any, of the

status of a driver of an automobile owned by another as to the driver's agency was in this case completely and wholly destroyed and overcome by the positive, undisputed testimony introduced in said cause showing clearly that the said Rulon D. Hair was not acting for his employer at the time of said accident, but wholly and completely in the furtherance of a purpose of his own.

(b) It is undisputed that Avenell Newby was riding in said automobile at the time of said accident as a gratuitous [77] guest of Rulon D. Hair, transported by him in said automobile as a guest contrary to positive written and oral instructions forbidding the hauling of guests or any person other than an employee of the defendant corporation. The evidence is completely and wholly insufficient as a matter of law to prove a waiver of said instructions to the said Rulon D. Hair on the part of either L. R. Donnelly or the R. J. Reynolds Tobacco Company.

(c) That the Meyers incident and the Dubois incident referred to in the evidence are wholly insufficient as a matter of law to prove the said Rulon D. Hair was an incompetent, careless or reckless driver, and does not establish his status as such, and save for the Meyers incident there is no evidence showing, or tending to show, that the said R. J. Reynolds Tobacco Company or L. R. Donnelly had any knowledge or information of any kind or character that the said Rulon D. Hair had ever been involved in any accident, and that the evidence, on the contrary, shows that he had a record showing a high degree of competency and care in the use of

said defendant's automobile; that the evidence is wholly insufficient as matter of law to establish in Rulon D. Hair a status of incompetency or of recklessness or carelessness.

(d) It is alleged and the evidence establishes the fact that Avenell Newby, at the time of the accident, was riding in said automobile as a gratuitous guest of Rulon D. Hair. The evidence fails to show that at the time of said accident the said Rulon D. Hair was guilty of violating the guest statute of the state of Idaho or that he was guilty of reckless disregard of the rights of Avenell Newby. The evidence further shows that at the time of said accident the said Avenell Newby was riding in said automobile in company with the said Rulon D. Hair at her request, and that she joined with the said Rulon D. Hair in any act or acts performed by him prior to the said accident and during the trip in which they were jointly engaged, and that preceding said accident she [78] was in a position to be as observant of surrounding conditions and of all acts or omissions on the part of the said Hair as was the said defendant, Rulon D. Hair; that she was conscious and could observe all of the acts of said defendant in the operation of said motor vehicle, but at no time made protest or objections of any act or acts regarding the operation of said vehicle, but acquiesced in the conduct of Rulon D. Hair, whatever the same might have been, in the operation of said automobile, and became, as a matter of law, as much liable for any act or omission of the driver of said car as the driver himself could have been, and thereby became, and her heirs now are, estopped from

asserting any dereliction of the said Rulon D. Hair as a basis for a claim for damages.

That in each and all of the particulars hereinbefore recited, said evidence is wholly insufficient in law to justify the verdict of the jury and the decision and is against the law governing and controlling such matters.

II.

Excessive damages appearing to have been given under the influence of passion and prejudice for the reasons recited in Paragraph I hereof.

III.

Errors in law occurring at the trial, more particularly as follows:

(a) Error of the Court in denying said defendants' motion to compel the plaintiffs to elect upon which of two inconsistent theories they intended to proceed upon the trial of said cause, that is, upon the alleged theory that Rulon D. Hair had a status as an incompetent or reckless driver, which was known to these defendants, or upon the theory that at the time of the accident the said Rulon D. Hair violated the guest statute of the state of Idaho, and was at said time acting within the scope of [79] his employment as an agent, servant or employee of L. R. Donnelly and/or R. J. Reynolds Tobacco Company.

(b) The Court erred in admitting in evidence any testimony touching the so-called Meyers incident, and particularly the testimony of F. H. Smullen, Ben Buskirk, and L. R. Donnelly, on cross-examination, and in refusing to strike all of said testimony and instructing the jury to completely

disregard the same, upon the ground that the same was highly prejudicial to the rights of these defendants, and failed to establish a status on the part of Rulon D. Hair as an incompetent driver.

(c) The Court erred in permitting the introduction in evidence of any testimony by the witness Sid Close pertaining to the so-called Dubois incident; that said testimony was highly prejudicial, and the striking of the same from the record did not cure said error.

(d) The Court erred in admitting in evidence plaintiffs' Exhibit number "22", the same purporting to be a certified copy of the Probate Court of Clark County, Idaho, reciting a plea of guilty to reckless driving by one B. R. Hair, residence: Soda Springs, Idaho.

(e) The Court erred in denying the defendants' motion for a directed verdict in favor of said defendants, for the reasons hereinbefore recited in the opening paragraph of this motion.

(f) The Court erred in refusing to give to the jury and denying defendants' requested instruction No. 5, to the effect that a high rate of speed, or even excessive speed, in driving an automobile is not in and of itself reckless disregard of the rights of a guest riding in said car.

(g) The Court erred in refusing to give to the jury and denying defendants' requested instruction No. 6 having to do with said defendants' written instructions to Rulon D. Hair for- [80] bidding him to carry a guest in said automobile.

(h) The Court erred in refusing to give to the jury and denying defendants' requested instruction

No. 7 touching the use of said automobile by Rulon D. Hair.

(i) The Court erred in refusing to give to the jury and denying said defendants' requested instruction No. 8 touching the use of said automobile at the time of said accident.

(j) The Court erred in refusing to give to the jury and denying defendants' requested instruction No. 9.

(k) The Court erred in refusing to give to the jury and denying defendants' requested instruction No. 10.

(l) The Court erred in refusing to give to the jury and denying defendants' requested instruction No. 12 dealing with the use of intoxicating liquor by a guest and driver.

(m) The Court erred in refusing to give to the jury and denying defendants' requested instruction No. 14, covering the failure of a guest to protest.

(n) The Court erred in refusing to give to the jury and denying defendants' requested instruction No. 15 covering and outlining what is necessary to establish the status of incompetency on the part of a driver, and further to the effect that one or two isolated acts cannot be considered as having such effect.

(o) The Court erred in refusing to give to the jury and denying defendants' requested instruction No. 16.

(p) The Court erred in refusing to give to the jury and denying defendants' requested instruction No. 17 advising the jury that they were to disregard any testimony given by Sid Close.

(q) The Court erred in refusing to give to the jury and denying defendants' requested instructions No. 21 and 22.

(r) The Court erred in giving to the jury those certain instruction to which said defendants excepted before the jury had retired, and all of them, and particularly those certain instructions as follows, to-wit: [81]

(1) "You are instructed, that while some evidence has been admitted as to defendant Rulon D. Hair having permitted other people to ride in his truck at various times, and as to a former accident in which defendant Rulon D. Hair was involved with a similar truck in Pocatello, Idaho, in the Spring of 1939, in which one Meyers was involved, and also evidence pertaining to the arrest plea of guilty of defendant Rulon D. Hair at Dubois, Idaho in 1939, for an alleged violation of a traffic law, you are instructed that you cannot consider any of said evidence received on either of said incidents as any evidence whatever supporting the charge against defendant Rulon D. Hair, in this action. This evidence was admitted as to defendant R. J. Reynolds Tobacco Company and L. R. Donnely as to their responsibility as covered in other instructions."

(2) "The Statute of Idaho make it unlawful for any person to drive any vehicle upon a highway carelessly and heedlessly in wilful or wanton disregard of the rights or safety of others, or without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property, and it is further provided in the State Statute that any person driving a vehicle on a highway shall drive the same at

a careful and prudent speed not greater than is reasonable and *property*, having due regard to the traffic, surface and width of the highway and of any other conditions then existing, and no person shall drive any vehicle upon a highway at such a speed as to endanger the life, limb or property of any person and in that Statute it is provided that it shall be *prima facie* lawful for a driver of a vehicle to drive the same on a highway at a speed not exceeding thirty-five miles an hour, and it is further provided in the State Statute that it shall be *prima facie* unlawful for any person to exceed the speed of thirty-five miles an hour on a highway outside of municipalities.”

(3) “You are instructed that a servant may be presumed *prima facie* to be acting in the course of his employment, wherever it appears, not only that his master was the owner of the given instrumentality, but also that, at the time when the alleged injury occurred, it was being used under conditions which normally attended those used in connection with the master’s business.”

(4) “You are instructed that if you should find from the evidence that the said Rulon D. Hair had previously, to the 11th day of September 1942, disobeyed the instructions of his employer or employers and had permitted guests to ride with him in the truck or trucks furnished him by the R. J. Reynolds Tobacco Company for the purpose of selling their products and that such fact or facts were known to the R. J. Reynolds Tobacco Company or any of its authorized agents or if by the use of ordinary [82] “diligence and precaution such facts could have been known to the said R. J. Reynolds Tobacco

Company or any of its agents, then the said defendants in this case could not avail themselves of the defense that the said Rulon D. Hair was acting contrary to instructions and outside the scope of his authority in hauling a guest, or in not attending to company business."

(5) "You are instructed that as it is conceded by the R. J. Reynolds Tobacco Company, that the deceased Avenell Newby was riding in the panel truck of said Tobacco Company as a gratuitous passenger or guest of Hair, then the defendants are liable if the accident resulting in the death of Avenell Newby shall have been caused by the operation through his intoxication or his reckless disregard of the rights of others and if you find from a preponderance of the evidence that anyone of these things was the proximate cause of the death of Avenell Newby, then your verdict should be for the plaintiffs, if you find for the plaintiffs upon the other issues."

(6) "You are instructed that it is conceded that the panel truck belonged to the R. J. Reynolds Tobacco Company and the facts show that the accident occurred during ordinary business hours; that the accident also occurred in the territory or locality in which the said Rulon G. Hair was authorized to operate as a salesman for R. J. Reynolds Tobacco Company products and that the said panel truck belonging to the R. J. Reynolds Tobacco Company and driven by Rulon D. Hair at the time of the accident contained property and products of the R. J. Reynolds Tobacco Company, ordinarily carried for sale by the said Rulon D. Hair in said

Panel truck and you are instructed that you may take into consideration these facts and circumstances to assist you in determining whether or not the said Rulon D. Hair was at the time of the accident acting within the scope of his employment."

That the foregoing instructions and each of them are erroneous as applied to the facts in this particular case and are, and each of them is, against the law governing and controlling this cause, and that specific exceptions to each of said instructions were made prior to the time the jury retired and form part of the Reporter's notes of the proceedings of this cause, and reference is hereby made to said exceptions and the same are adopted herein with like effect as if the same were set out following each of the above quoted instructions. [83]

Said motion is based and will be made upon all the records, files, pleadings, and proceedings in said action, including the instructions given, and the instructions requested by the defendants and refused by the Court, and upon the minutes of the Court as stated and defined in Rule 50 of the Rules of Practice of this court, which embraces the Reporter's Transcript of his notes in said cause.

A. L. MERRILL,

R. D. MERRILL,

Residence: Pocatello, Idaho.

E. B. SMITH,

Residence: Boise, Idaho. Attorneys for said defendants R. J. Reynolds Tobacco Company and L. R. Donnelly.

(Service Acknowledged)

[Endorsed]: Filed Nov. 2, 1943. [84]

[Title of Court and Cause.]

PETITION OF RULON D. HAIR ON MOTION
FOR JUDGMENT NOTWITHSTANDING
VERDICT AND, IN THE ALTERNATIVE,
FOR A NEW TRIAL

Comes now Rulon D. Hair, one of the above named defendants and moves the court to set aside the verdict and judgment entered thereon and enter judgment in his favor notwithstanding the verdict in accordance with the motion made by said defendant for a directed verdict at the close of the case, which motion was made by this defendant at the conclusion of all of the evidence.

And as this defendant's petition on motion for judgment notwithstanding the verdict and in the alternative for a new trial, this defendant hereby joins in and adopts the petition on motion for judgment notwithstanding verdict and in the alternative for new trial filed in the above entitled court and matter by the other defendants in said action; R. J. Reynolds and L. R. Donnelly, and hereby refers to the same as and for reference hereby adopts the same as if set forth at this point.

(a) That the evidence is wholly insufficient to support a verdict for the plaintiffs and against this defendant, more particularly because said evidence was wholly insufficient to show that Rulon D. Hair was a careless, reckless or incompetent driver.

(b) That the evidence failed to show that, at the time of said accident, the said Rulon D. Hair was in any way guilty of violating the gratuitous guest

statute of the state of Idaho or that he was guilty of reckless disregard of the rights of Avenell Newby. That at the time of said [85] accident and for some time prior thereto, the said Avenell Newby was riding in said automobile as a guest of Rulon D. Hair, and at her instance and request; that immediately prior to said accident she was in a position to be as observant of all surrounding conditions and of all acts or omissions, if any, on the part of the said Hair as was Hair himself; that she was conscious and could observe the acts of the defendant in the operation of said automobile, but that she made no protests or objections to anything done or omitted by the said Rulon D. Hair, but acquiesced in his conduct and in the operation of said automobile.

(c) That the evidence introduced of a former incident of defendant resulting in his arrest at Duboise, Idaho, and a former incident of an accident at Pocatello, Idaho, involving one Myers and the defendant, both of which occurred more than three years prior to the accident referred to in this suit were introduced and admitted for the purpose of showing Rulon D. Hair to be a careless, reckless or incompetent driver was wholly and completely incompetent, irrelevant, and immaterial, and insufficient as matter of law to establish the status of incompetency or carelessness or recklessness on the part of said Rulon D. Hair, and was highly prejudicial to this defendant and should have been excluded from the jury.

Said defendant refers to his motion as made in open court and as the same appears in the notes of the Reporter for full particulars.

In the event of a failure of the court to grant said motion for judgment notwithstanding the verdict, then this defendant moves for an order setting aside the verdict and judgment rendered herein and granting a new trial pursuant to Rule 50 of the Rules of Federal Procedure, and the Rules of this court, upon the following grounds:

For the grounds of this motion this defendant hereby refers to and by reference adopts as fully as if set forth at this point all of paragraphs one, two, and three of the grounds of insufficiency of the evidence to justify the decision or verdict, and that the same is against the law set forth in the said motion filed by defendants, Reynolds Tobacco Company and L. R. Donnelly, filed in the above entitled court and made with the same effect as if the same were accompanying in full at this point.

Said motion is based upon and will be made upon all of the [86] records filings and pleading and proceedings in said action, including instructions given and the instructions requested by defendants and refused by the court, and upon minutes of the court as stated and defined by Rule 50 of the Rules of

Procedure of this court which embraces the Reporter's Transcript of his notes in said case.

ROY BLACK,

JOHN R. BLACK,

Residing at Pocatello, Idaho,

Attorneys for defendant,

Rulon D. Hair.

(Service Acknowledged)

[Endorsed]: Filed Nov. 2, 1943. [87]

[Title of Court and Cause.]

MINUTES OF THE COURT

January 5, 1944

This cause came on for hearing at this time, upon agreement of counsel for all parties to the action, on the Motions for judgment notwithstanding verdict, and, in the alternative, for a new trial.

The defendants, R. J. Reynolds Tobacco Company and L. R. Donnelly, were represented by E. B. Smith, Esquire, who made oral argument on behalf of said defendants. The defendant Rulon D. Hair appeared by letter of his counsel, Messrs. Black and Black; and the plaintiff's counsel presented the plaintiff's resistance to said motions on brief.

The Court, being fully advised in the premises, announced his conclusions, and ordered that both Motions for judgment regardless of verdict and Motions for new trial be, and the same hereby are, denied. All defendants were granted exceptions to the Order. [88]

[Title of Court and Cause.]

NOTICE OF APPEAL BY R. J. REYNOLDS
TOBACCO COMPANY AND L. R. DON-
NELLY.

Notice Is Hereby Given That R. J. Reynolds Tobacco Company, a corporation, and L. R. Donnelly, two of the defendants above named, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from that certain final judgment made and entered in the above entitled court and cause on the 23rd day of October, 1943, which said judgment is in favor of the plaintiffs above named and against these two appealing defendants, and each of them; also against one Rulon D. Hair.

Dated this 20th day of January, 1944.

E. B. SMITH,

Residence: Boise, Idaho,

A. L. MERRILL,

R. D. MERRILL,

Residing at Pocatello, Idaho,

Attorneys for said defendants,

R. J. Reynolds Tobacco
Company and L. R. Donnelly.

[Endorsed]: Filed Jan. 20, 1944. [89]

[Title of Court and Cause.]

**COST BOND ON APPEAL OF R. J. REYNOLDS
TOBACCO COMPANY AND L. R. DON-
NELLY**

Know All Men By These Presents:

That we, R. J. Reynolds Tobacco Company, a corporation, and L. R. Donnelly, as Principals, and United States Fidelity and Guaranty Company, a corporation organized under the laws of the State of Maryland and authorized to transact the business of acting as sole surety upon bonds and undertakings in the State of Idaho, as Surety, are held and firmly bound unto George H. Newby, in his own behalf, Richard Arlen Newby and Patty Ann Newby, both minors, by their guardian ad litem, George H. Newby, the above named plaintiffs and appellees in the above entitled cause, in the sum of Two Hundred Fifty (\$250.00) Dollars, for which sum well and truly to be paid we bind ourselves and our and each of our successors and assigns, jointly and severally, firmly by these presents.

Sealed with out seals and dated this 20th day of January, 1944.

Whereas, on the 23rd day of October, 1943, in the District Court of the United States for the District of Idaho, Eastern Division, in a suit pending in that Court wherein George H. Newby, in his own behalf, Richard Arlen Newby and [90] Patty Ann Newby, both minors, by their guardian ad litem, George H. Newby, were plaintiffs, and R. J. Reynolds Tobacco Company, L. R. Donnelly and Rulon

D. Hair were defendants, a judgment was rendered against said defendants in the sum of \$7,500.00, with interest and costs, and said defendants, R. J. Reynolds Tobacco Company and L. R. Donnelly, having filed in the office of the Clerk of said District Court a notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit:

Now, Therefore, the condition of this obligation is such, that if the said R. J. Reynolds Tobacco Company and L. R. Donnelly, the appellants, shall prosecute said appeal and pay all costs that may be rendered against them or either of them if the appeal is dismissed or the judgment affirmed, or such costs as the appellate court may award against these defendants or ether of them if the judgment be modified, then the above obligation is void, otherwise to remain in full force and effect.

R. J. REYNOLDS TOBACCO
COMPANY,

By E. B. SMITH,

One of its attorneys of record,
Residing at Boise, Idaho,

L. R. DONNELLY,

By E. B. SMITH,

One of his attorneys of record,
Residing at Boise, Idaho,
Principal.

UNITED STATES FIDELITY
AND GUARANTY COMPANY
By HENRY WHITSON,

Its attorney in fact,
Surety.

[Seal] HENRY WHITSON,
Resident Agent,
Residing at Boise, Idaho.

[Endorsed]: Filed Jan. 20, 1944. [91]

[Title of Court and Cause.]

PETITION FOR APPROVAL OF SUPER-
SEDEAS AND STAY ON APPEAL

Come now R. J. Reynolds Tobacco Company and L. R. Donnelly, two of the above named defendants and appellants, and represent as follows:

That Judgment was entered in the above entitled court and cause on the 23rd day of October, 1943, in favor of George H. Newby, in his own behalf, Richard Arlen Newby and Patty Ann Newby, both minors, by their Guardian Ad Litem, George H. Newby, the above named plaintiffs, and against R. J. Reynolds Tobacco Company, L. R. Donnelly and Rulon D. Hair, as defendants, for the sum of Seven Thousand Five Hundred (\$7,500.00) Dollars, with interest thereon at 6% per annum from the 23rd day of October, 1943, and costs taxed at \$89.40 Dollars; that R. J. Reynolds Tobacco Company and L. R. Donnelly, two of the above named defendants,

have appealed from said Judgment to the United States Circuit Court for the Ninth Circuit, and desire the Court to fix the amount of a supersedeas bond for them and each of them, approve the form thereof, and also approve the Maryland Casualty Company, a corporation, as Surety, and thereupon order a stay of proceedings as against these two appellants, according to law.

Now, therefore, Petitioners pray that the Court fix the [92] amount of said supersedeas bond, approve the form of the bond tendered herewith, and the Surety thereon, and order a stay according to law.

Dated this 20th day of January, 1944.

E. B. SMITH,

Residing at Boise, Idaho,

A. L. MERRILL,

R. D. MERRILL,

Residing at Pocatello, Idaho,

Attorneys for said defendants.

[Endorsed]: Filed Jan. 20, 1944. [93]

[Title of Court and Cause.]

ORDER APPROVING BOND AND GRANTING
STAY OF EXECUTION AGAINST R. J.
REYNOLDS TOBACCO COMPANY AND
L. R. DONNELLY

The defendants, R. J. Reynolds Tobacco Company and L. R. Donnelly, having this day filed their Notice of Appeal from the Judgment rendered in the above entitled cause in favor of the plaintiffs, George H. Newby, in his own behalf, Richard Arlen Newby and Patty Ann Newby, both minors, by their Guardian Ad Litem, George H. Newby, and against the defendants, R. J. Reynolds Tobacco Company, L. R. Donnelly and Rulon D. Hair, to the United States Circuit Court of Appeals for the Ninth Circuit, and having filed their petition for an order fixing the amount of the supersedeas bond so far as they are concerned, and approving the proposed surety, and the form of said bond and granting a stay of proceedings;

Now, Therefore, it is hereby ordered that the amount of said Supersedeas Bond be fixed in the sum of Nine Thousand (\$9,000.00) Dollars, and the bond tendered by the said R. J. Reynolds Tobacco Company and L. R. Donnelly in said sum with Maryland Casualty Company, a corporation, as surety, be and the same is hereby in all respects approved, and that all proceedings herein for the collection of said judgment against R. J. Reynolds

Tobacco Company and L. R. Donnelly be and they are hereby stayed [94] according to law.

Dated this 20th day of January, 1944.

CHASE A. CLARK,
District Judge.

[Endorsed]: Filed January 20, 1944. [95]

[Title of Court and Cause.]

TRANSCRIPT OF TESTIMONY

This matter was tried before the Honorable Chase A. Clark, United States District Judge, for the District of Idaho, sitting with a jury, at Pocatello, Idaho, on October 20, 1943.

APPEARANCES

Glen A. Coughlin, Montpelier, Idaho,
Ben W. Davis, Pocatello, Idaho,
Attorneys for the Plaintiffs,

Messrs. Merrill & Merrill, Pocatello, Idaho,
E. B. Smith, Boise, Idaho,
Attorneys for the defendants, Reynolds Tobacco
Company and L. R. Donnelly.

Messrs. Black & Black, Pocatello, Idaho,
Attorneys for the defendant Rulon D. Hair.

[96]

October 20, 1943

2 o'clock P. M.

(Jury selected and sworn to try the cause.)

Mr. Smith: We have made a motion to require the plaintiff to elect and also a motion to strike portions of the complaint not tending to support the theory not elected by the plaintiffs. Our motion is to the effect that the Court require the plaintiff to elect upon which theory they intend to rely, upon the claimed negligence of the defendants Tobacco Company and L. R. Donnelly in permitting Rulon D. Hair to use and operate the Chevrolet Panel truck. Paragraph seven of the complaint is to the effect that Hair had permission of L. R. Donnelly to use the automobile on the highways of Idaho, notwithstanding that at all of the said times the said Tobacco Company and Donnelly knew that Hair was a careless and reckless and incompetent driver of an automobile. The second part of our motion is whether or not they intend to rely on the theory that Avenell Newby was a guest with Mr. Hair at the time of the accident as alleged in paragraph eight of the complaint and thereby making an attempt to recover under the so called Idaho Guest Statute, the two theories being diametrically opposed.

The Court: I had this matter [99] under consideration to a great extent at the time I permitted the amendment to the complaint. I want to call your attention to rule 18: "The plaintiff in his complaint or in a reply setting forth a counterclaim

and the defendant in an answer setting forth a counterclaim may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party." In the face of that rule it seems to me that they would have a right to do the very thing you are arguing against.

Mr. Smith: It occurs to me that the rule has in mind two different claims arising out of different transactions. There is only one basic claim from which damages could flow, it was the accident.

The Court: I am of the opinion that the rule is broad enough to cover this situation, otherwise I would not have permitted the amendment to the complaint, bringing in what I considered a new and separate cause of action. If you have any authorities that you want to present on this matter I would be glad to have them. I am not taking snap judgment on this because I have thought a good deal about it, I have given the matter considerable attention.

Mr. Merrill: It seems to us that [100] as Mr. Smith argued, that rule goes to the cases where they have different claims and would attempt to secure a verdict on each claim and not a case where they are attempting to allege different actions or counts for the same claim,—

The Court: —I want counsel to have an opportunity to fully present this but it seems to me the rule is intended to give a party, in a single action, all of the relief to which he is entitled. If a person had two grounds of recovery there would be no way of placing these grounds before the jury

except in separate actions. I am inclined to feel under the rule that the plaintiff should not be required to elect. The motion is overruled and you may have your exception.

Mr. Black: May we have an exception to the ruling also?

The Court: Yes, you may have an exception. Now, you may make your opening statement.

(Opening statement by Mr. Davis.)

MIKE McGUIRE

being called as a witness on the part of the plaintiff after being first duly sworn testifies as follows:
being called as a witness on the part of the plaintiff,

Direct Examination

By Mr. Coughlin: [101]

Q. State your name? A. Mike McGuire.

Q. Where do you reside?

A. At Pocatello, at the present time.

Q. What is your occupation?

A. Assistant Roadmaster for the Union Pacific Railroad.

Q. How long have you worked for the Union Pacific Railroad Company? A. Eight years.

Q. You said eight years. A. Yes sir.

Q. Were you traveling between Soda Springs, Idaho, and Montpelier, Idaho, on the afternoon of September 11, 1942? A. Yes sir.

Q. Which direction were you going?

A. I was going south, toward Montpelier.

(Testimony of Mike McGuire.)

Q. Do you know Mr. Rulon D. Hair?

A. Not personally acquainted with him, but I know him if I see him.

Q. Is he in the Court room now?

A. Yes sir.

Q. Can you point him out?

A. He is the fourth man from the end there (indicating).

Q. Did a Camel cigarette truck pass you on the road between Soda Springs and Montpelier, that day? [102]

A. Yes sir.

Mr. Merrill: Objected to as leading.

The Court: It is leading but the answer may stand.

Q. Who was driving this truck?

Mr. Merrill: Objected to as calling for a conclusion.

Mr. Coughlin: Withdraw the question.

Q. Do you know who was driving the truck at the time he passed you?

A. At the time he passed me I didn't, but after I picked them up.

Q. Do you know now who was driving the truck?

A. Yes sir, I do.

Q. Who was driving that truck?

A. Mr. Hair.

Q. This defendant (indicating)?

A. Yes.

Q. Which direction was it going.

A. South.

Q. The same direction you were going?

A. Yes sir.

(Testimony of Mike McGuire.)

Q. When did you first notice this truck?

A. Well, as I was going down the highway I noticed it as it went around me.

Q. What called your attention to the fact that the truck was [103] there?

A. What called my attention to it was that he started honking and then he went around me.

Q. Did he honk the horn after he passed you?

A. Yes sir.

Q. And as he went around you?

A. Yes sir.

Q. And how long before,—did he honk it before he went around you, Mr. McGuire?

A. Yes sir.

Q. How fast were you going as the truck passed you? A. About thirty-five.

Q. You mean thirty-five miles an hour?

A. Yes sir.

Q. Do you know what kind of an automobile this was?

A. I know it was a little panel truck, I don't know the make of the car.

Q. Were there any signs on the truck?

A. Yes sir.

Q. What were they?

A. Prince Albert sign on the side of the truck and a package of cigarettes painted on the door.

Q. How long have you driven an automobile Mr. McGuire? A. Around ten years.

Q. Are you acquainted with the speed of automobiles? A. Yes, I think so. [104]

(Testimony of Mike McGuire.)

Q. Have you had occasion to judge the speed of automobiles? A. Not automobiles.

Q. Well, of any vehicles?

A. Only the speed that we have on the railroad.

Q. In your opinion, Mr. McGuire, how fast was the truck going at the time it passed you on that day, on the highway between Soda Springs and Montpelier, Idaho?

Mr. Merrill: Object to that question as calling for a conclusion of the witness, and no proper foundation has been laid and it is immaterial as to the point where it passed him.

The Court: He may answer.

A. In my opinion it would be around sixty miles an hour.

Q. About how long was it from the time that the truck passed you until you next saw it?

A. It is kind of hard to answer that question.

Mr. Merrill: If he says he cannot answer, we object to further question on that as being speculative.

Mr. Coughlin: Very well.

Q. Mr. McGuire, about where were you when the truck passed you on the road, that is, with relation to the road from Soda Springs to Montpelier?

A. I was between a quarter and a half mile south of the overpass, just south of Soda Springs.

Q. How far was it from this point until you next saw the truck? [105]

A. I would say between eight and ten miles.

(Testimony of Mike McGuire.)

Q. Are you able to say how long it took you to go that distance?

Mr. Merrill: Objected to as not being material and no foundation is laid.

The Court: He may answer.

A. It could be around twenty-five or thirty minutes.

Q. Now, Mr. McGuire, just tell the jury how you next happened to see that truck?

A. Well, after it passed me I continued on down the road until I came to the place where I heard a horn honking and I looked in the mirror and couldn't see anything in it, and as I came up on it I saw this truck upside down over in the borrow-pit.

Q. What did you do?

A. I stopped and went down to see if there was anybody in it.

Q. You went to see if there was anyone in the truck?

A. Yes sir.

Q. Was there anyone in it?

A. Yes sir.

Q. Who was in the truck?

A. There was a woman in the truck and just as I got there Mr. Hair came around from the other side of it.

Q. Was the woman still inside the automobile?

A. Yes sir.

Q. Did Mr. Hair make any statement to you with reference to the cause of the accident? [106]

A. Yes sir.

Q. What did he say?

(Testimony of Mike McGuire.)

A. He said he just was drinking and driving too fast.

Q. What did you do then?

A. We took her out of the car and put her in mine and took her to Montpelier, to the hospital.

Q. You mean by "her" the woman who was in the truck? A. Yes sir.

Q. Did you notice any marks on the highway made by the truck before it tipped over?

A. After I stopped I looked back down the highway and I seen the last track where he swerved across the highway, I didn't pay much attention to it, but I do remember the track there.

Q. What was the condition of the truck?

A. The top was caved in. I didn't pay any particular attention to it only that the top was smashed in. It was upside down.

Q. Did you notice any merchandise there at the scene of the accident? A. Yes sir.

Q. Where was that?

A. That was scattered all over the ground, around the truck there.

Q. Do you know what kind of merchandise it was?

A. It was chewing tobacco and cigarettes. [107]

Q. Do you know what kind of cigarettes?

A. I didn't pay much attention to the brand.

Q. Between the time that the truck passed you and the time you came upon the scene of the accident, did you see or pass any truck or semi-trailer?

A. No.

(Testimony of Mike McGuire.)

Mr. Merrill: We object to that as leading, and we move the answer be stricken for the purpose of the objection?

The Court: I will overrule the objection. The answer may stand in the record.

Q. Did you meet any vehicle of any kind after the time the truck passed you and before the time you came upon the scene of the accident?

A. No sir.

Mr. Coughlin: You may examine.

Cross Examination

By Mr. Black:

Q. You had been down to Soda Springs?

A. Yes sir.

Q. Is that where you came from that afternoon?

A. No sir, I came from Bancroft.

Q. Did you stop at Soda Springs?

A. Yes sir.

Q. You were going from Soda Springs when you approached the scene of this accident? [108]

A. Yes sir.

Q. This truck passed you when you were about a quarter of a mile beyond the overpass?

A. Yes sir.

Q. How far is the overpass from Soda Springs?

A. I don't know.

Q. Are you familiar with that road?

A. Not too familiar.

Q. How often have you been over that road?

A. Two or three times.

(Testimony of Mike McGuire.)

Q. Including this time you speak of?

A. Up to that day.

Q. How much have you driven automobiles?

A. I have driven automobiles quite a bit.

Q. Did you own—strike that please,—do you have one now?

A. Yes sir.

Q. Have you driven a truck such as the defendant was driving on that day?

A. No.

Q. You don't attempt to state to the jury accurately how fast that truck was going when it passed you?

A. No sir, not accurately.

Q. If you were going thirty-five miles an hour and a car passed you, just while it was passing you wouldn't it have to go faster than you were going?

A. Yes sir. [109]

Q. And that is the time you refer to when you say it was going at a high rate of speed?

A. Yes sir.

Q. After this car passed you, you didn't see it again until you came upon the truck where the accident had occurred?

A. No sir, I didn't.

Q. You didn't see it between those times?

A. No sir.

Q. After this truck passed you, the next time you saw it was when it was turned upside down by the side of the road?

A. Yes that is right.

Q. Had it been raining that day?

A. Yes sir, it has been.

Q. And it was raining while you were driving from Soda Springs that day?

A. Yes sir.

(Testimony of Mike McGuire.)

Q. Do you know the condition of the road, along the side of the pavement? A. No sir.

Q. What kind of a roadbed was it between Soda Springs and where this accident occurred?

A. Black asphalt road.

Q. Paved in the center? A. Yes sir.

Q. Do you know how wide the pavement is there? A. No sir. [110]

Q. Is there a yellow or white line to mark the middle of the road where this accident occurred?

A. Not that I seen.

Q. You didn't observe it? A. No sir.

Q. You say your attention was called to the truck off the road by the horn sounding?

A. Yes sir.

Q. It was sounding while the truck was in that position, that is, while the truck was upside down?

A. Yes sir.

Q. What did you do with reference to stopping?

A. I just drove up and stopped at the accident.

Q. Stopped in the highway opposite where the truck was? A. Yes sir.

Q. Was there any borrow pit along there?

A. Not a deep one.

Q. There was a pit?

A. Yes, I guess there was, but not a deep one.

Q. How deep was it?

A. I cannot say just how deep it was.

Q. Do you know how wide it was?

A. No sir.

(Testimony of Mike McGuire.)

Q. Do you know how wide the shoulder on the highway was at the place of the accident?

A. No sir. [111]

Q. You personally didn't make any examination to see how this accident occurred, by examining any marks, making any measurements or anything of that kind?

A. No sir.

Q. When you got there you saw Mr. Hair coming out of the car?

A. No sir.

Q. Did you see him get out or was he out?

A. I never saw him get out of the car, but as I walked up he came around from the other side of the car.

Q. Did he say anything to you about someone being in the car?

A. Yes, he did.

Q. What did you do then?

A. We started to get the woman out of the car.

Q. He kept at that until he got this lady out of the car?

A. Yes sir, he did.

Q. You and him put the lady in your car?

A. Yes sir.

Q. And took her to the hospital at Montpelier?

A. Yes sir.

Q. Now Mr. McGuire where was it that Mr. Hair made the statement to you about the cause of the accident?

A. After we laid her in the car and started to Montpelier.

Q. You say that he made some statement to you?

A. Yes sir.

(Testimony of Mike McGuire.)

Q. Did he at that time tell you anything about what had happened in the highway? [112]

A. No sir.

Q. He didn't tell you about anything that happened to his tires, or to the tires of his car?

A. No sir.

Q. Or about going off the pavement?

A. No sir.

Q. So that the only statement you say he made was the statement he made about this accident?

A. Yes sir.

Q. You made no personal examination yourself.

A. No sir.

Q. Now, Mr. McGuire, do you have in mind, any judgment at this time, as to how far it was,—how many miles it was from the place this truck passed you to the place where you found the truck again?

A. I would just make the guess that it was between eight and ten miles.

Q. Might have been farther and might have been less?

A. May have been further and may have been less.

Q. You don't remember of meeting any semi-trailer truck? A. No sir.

Q. Do you mind telling us how fast,—strike that,—Mr. McGuire let me ask you, do you mean to tell this jury that in driving down the highway without any interest in what cars passed you, that you could be sure that you didn't pass another car or truck? [113] A. Yes sir.

(Testimony of Mike McGuire.)

Q. You could be sure of that? A. Yes sir.

Q. Did you meet any cars on this day before you got to Soda Springs, between Bancroft and Soda Springs? A. Several cars.

Q. Nothing unusual about meeting a car or semi-trailer on the road? A. No sir.

Q. Did you notice whether Mr. Hair himself was injured? A. No sir.

Q. Did you notice his head, where it was bleeding or anything of that kind?

A. He wasn't bleeding too much, maybe a little scratch on his forehead that I remember.

Q. You do remember some marks on him?

A. Yes sir.

Q. You didn't ask him how much he was hurt?

A. No sir.

Q. Or whether he was hurt? A. No sir.

Q. You had no conversation about that?

A. No sir.

Mr. Black: You may inquire.

Cross Examination

By Mr. Merrill: [114]

Q. Mr. McGuire, you have passed other cars on the highway? A. Yes, lots.

Q. You speed up when you do pass?

A. Yes, if I am going the same way.

Q. It isn't unusual for a passing car to speed faster than the one it is passing? A. No sir.

Q. And it is not unusual for a passing car to sound the horn, is it? A. In some cases.

Q. They frequently do that? A. Yes sir.

(Testimony of Mike McGuire.)

Q. Mr. Hair did that? A. Yes sir.

Q. He passed you and did that?

A. Yes sir.

Q. Were you watching your speedometer at that time?

A. I looked at it just before he passed me.

Q. You looked just before? A. Yes sir.

Q. It was just over the overpass?

A. About a half a mile.

Q. And it is just outside of the city limits?

A. I cannot say, but I know it is not too far.

Q. How far would you say it was,—a quarter of a mile?

A. I wouldn't say. I am not familiar enough with that. [115]

Q. How many miles from Soda Springs was this accident? A. I couldn't tell you.

Q. Is the road straight from Soda Springs to where this accident happened? A. No sir.

Q. It winds around quite a bit?

A. Yes sir.

Q. Market roads, and country roads intersect the highway along that stretch? A. Yes sir.

Q. Several between Soda Springs and where it passed you? A. Yes sir.

Q. Would you recognize a picture of the car if you saw it? A. Yes sir.

Q. You are handed what has been marked as defendant Tobacco Company's exhibit 1, I will ask you if you recognize that to be a picture of that car after the accident?

(Testimony of Mike McGuire.)

A. The way it is facing me I couldn't tell.

Q. Did you notice the license on the car?

A. No sir.

Q. You didn't notice that? A. No.

Q. Did you notice whether or not the right front tire had been blown out? A. No sir.

Q. You didn't pay any attention to that? [116]

A. No sir.

Q. Didn't make any observations?

A. No sir.

Q. Then you don't know whether this is the car or not? A. No sir.

Q. We are *no* handing you what has been marked defendant Tobacco Company's exhibit 2, do you recognize that as a photograph of the highway? A. Yes sir.

Q. That looks like the markings on the highway which you saw? A. That looks like it.

Q. Would you say that is a fair representation of the markings on the highway? A. Yes sir.

Mr. Merrill: We offer in evidence defendant Tobacco Company's exhibit 2.

Mr. Davis: No objection.

The Court: It may be admitted.

Q. Now, Mr. McGuire, your work is with the Railroad Company? A. Yes sir.

Q. Your attention to speed is directed to the speed of trains? A. Yes sir.

Q. You have never had any particular experience with automobile speed, or made any study in judging speeds of automobiles? [117]

A. No sir.

(Testimony of Mike McGuire.)

Q. What kind of car were you driving?

A. Pontiac, 1938, four door sedan.

Q. How many cylinders? A. Six.

Q. Six cylinder Pontiac? A. Yes sir.

Q. You don't profess to be a judge of the speed of automobiles? A. No sir.

Mr. Merrill: That is all.

Redirect Examination

By Mr. Coughlin:

Q. Is the road straight there where the accident happened? A. I wouldn't be sure.

Q. Did you have any difficulty in getting the lady out of the car?

Mr. Merrill: We object to that it is immaterial and improper cross,—improper redirect examination.

The Court: The objection is sustained, I don't think it is material.

Q. Mr. McGuire, was there anything unusual about the sounding of this horn at the time the car passed you? A. Yes sir.

Q. What was that?

A. What called my attention to it was that they started [118] honking so far behind me and kept honking so far after they went by.

Q. What were you particularly interested in at the time you came upon the scene of the accident?

Mr. Merrill: Objected to as immaterial.

The Court: He may answer.

A. To see if there was anybody in it.

(Testimony of Mike McGuire.)

Q. You mean to see if there was anyone in the car? A. Yes.

Q. Anything else? A. That was all.

Q. And after that, what were you interested in?

A. Getting the woman out and to the hospital.

Q. Is that the reason you didn't make any particular observation? A. Yes sir.

Q. With reference to that exhibit 2, does that show the entire road at the scene of the accident and all the markings?

Mr. Merrill: Object to that it is obviously immaterial, it is also leading. The picture shows for itself. Obviously there is more of the road on both ends.

The Court: He may answer as to what he knows.

A. I would not be sure, I didn't examine it close enough. [119]

Q. Which hospital did you take Mrs. Newby to?

A. You got me there, I cannot remember the name of it.

Q. Do you know the Doctor's name who attended her? A. Yes sir.

Q. Who was that? A. Doctor Lindsey.

Mr. Coughlin: That is all.

Recross Examination

By Mr. Merrill:

Q. You say that the horn was honking when you came up to the car on the highway?

A. Yes sir.

Q. It was caught? A. Yes sir.

(Testimony of Mike McGuire.)

Q. You have experienced horns of automobiles catching before have you not? A. Yes sir.

Q. Did you lift this lady out of the car?

A. Mr. Hair and I.

Q. Did you smell any liquor on her breath.

A. I wouldn't say yes, I wasn't interested.

Q. You wouldn't say no.

A. No, I wasn't interested.

Mr. Merrill: That is all.

Mr. Coughlin: That's all.

A. P. BUNDERSON [120]

called as a witness on the part of the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Coughlin:

Mr. Merrill: We move at this time that there be stricken from the evidence and the jury instructed to disregard that statement of the witness that when the car passed him it was going around sixty miles an hour for the reason that he further testified that it was eight or ten miles before he came upon this car and he further testified that it was between twenty-five and thirty minutes before he reached this point. Obviously that testimony as to the speed and the time it took him to get to the car, twenty-five or thirty minutes and the testimony as to the distance of eight to ten miles does not have any bearing on any issue in this matter.

(Testimony of A. P. Bunderson.)

The Court: The jury will give the testimony what weight it is entitled to receive, I think the motion will be denied.

Mr. Merrill: Exception.

The Court: Yes, exception is granted, of course.

Q. Now, will you state your name?

A. Alton P. Bunderson.

Q. Where do you reside? [121]

A. Paris, Idaho.

Q. What is your occupation?

A. Sheriff of Bear Lake County.

Q. How long have you been Sheriff?

A. I am on my third year.

Q. What was your occupation immediately prior to this position? A. State police.

Q. How long did you hold that position?

A. Two years.

Q. In your work both as Sheriff and as State Patrolman you have had occasion to investigate many accidents? A. Yes sir.

Q. Have you attended police schools and traffic schools?

Mr. Merrill: Objected to as leading.

The Court: Yes, I think it is leading but now that the question is asked, I guess he may answer.

A. I would say police schools.

Q. Did you have occasion to investigate an automobile accident on September 11, 1942 which happened about twenty miles north of Montpelier on highway U. S. Number 30? A. Yes sir.

(Testimony of A. P. Bunderson.)

Q. At what time were you first called to this accident?

A. About five-fifteen or five-twenty.

Q. That was the first call. [122]

A. Yes sir.

Q. What time did you arrive at the scene of the accident? A. I don't know.

Q. Could you say approximately?

Mr. Merrill: We object to that on the ground that he has answered the question.

The Court: The question now asked is approximately. He may answer.

A. Approximately a quarter to six.

Q. Did you make a thorough and complete investigation of the accident?

Mr. Merrill: Objected to as calling for a conclusion of the witness. The most he could do is state what he did.

The Court: Sustained.

Q. What did you do Mr. Bunderson upon arriving at the scene of the accident?

A. Started my investigation.

Q. What then did you do? What was the first thing you did?

A. I looked the wreck over and found nobody around it, and then I immediately started to make my measurements on the highway.

Q. Did you note any tracks leading up to the scene of the accident?

Mr. Merrill: Objected to as leading. [123]

The Court: Yes, I think the witness can tell the

(Testimony of A. P. Bunderson.)

result of his investigation without counsel leading him.

Q. Very well, will you just tell the jury what you did from the time you got to the scene of the accident and what you found and the result of your measurements?

A. After I arrived at the accident I looked the automobile over, and then I walked up the road leading from the wreck. The pavement was dry at the time I got there but the sides of the road were wet. I walked back up until I could see where the tracks had taken off the oiled highway. I took a measurement from that point, all of the measurements were measured by a steel *tape*. We found that the car left the oiled highway on the west side of the road, the tracks left the oiled road and stayed off the oil for 117 feet to the west; the tracks then came back on the oil and went across the 177 feet before they left the east side of the road. They stayed off the oil on the east side until they came back on 166 feet farther. That put them back on the oil again and the tracks led west across the oil again for 146 feet to where they took off the oil and stayed off the oil for 66 feet and then they went east again across the oil 92 feet and from there it went into the borrowpit and up on the east side of the borrowpit.

Q. How many feet was it from the side of the oil,—the east [124] side of the oil mat to the point where the automobile stopped?

A. Eighty-two feet.

(Testimony of A. P. Bunderson.)

Q. In what position was the automobile setting?

A. It was on its back with the wheels in the air, facing the northwest.

Q. You say the automobile was turned over?

A. Yes sir.

Q. Could you tell which way it turned, on the side or on the top?

A. It looked to me like it turned half end-ways and half side-ways.

Q. Did you see any rocks on either side of the road?

Mr. Merrill: Objected to as leading.

The Court: I will let him answer, but the question is somewhat leading.

A. No sir.

Q. What else did you do then?

A. After I *make* all the required measurements I summoned the wrecker. I had stayed there and watched the cargo until the wrecker came.

Q. Did you see any merchandise?

A. Yes sir.

Mr. Merrill: Objected to as immaterial and leading.

The Court: Overruled. [125]

Mr. Merrill: We think we will object to the witness reading from a memorandum unless he shows it to counsel for the other side.

The Court: Does counsel wish to see this memorandum?

Mr. Davis: Certainly we have no objection to that.

(Testimony of A. P. Bunderson.)

Q. Were you using this memorandum in regard to the wreck?

The Court: I think he may answer the former question by a yes or no answer.

A. Yes sir.

Q. And what was that merchandise?

A. Several cartons of camel cigarettes.

Q. What was done with this merchandise?

A. This merchandise was covered up and when the wrecker came it was all thrown in,—there could have been some of it thrown in the wrecker, but most of it was thrown in the back of the tobacco truck and the door was wired shut. The door was bent.

Q. Did you make any sketch of the scene,—any sketch or plat of it at that time? A. Yes sir.

Q. Do you have that plat with you?

A. Yes sir.

Q. Is the plat drawn to scale?

A. No sir. [126]

Q. Does it represent the true facts at the scene of the accident? A. Yes sir,—

Mr. Merrill: May that answer be stricken for an objection?

The Court: Yes it may be stricken.

Mr. Merrill: We object to that as calling for a conclusion of the witness, it is incompetent and no proper foundation is laid. He has testified already that it didn't, that it wasn't drawn to scale.

The Court: He may testify as to whether it represents the facts as he found them.

(Testimony of A. P. Bunderson.)

Q. I will ask you if it represents the facts as you found them there?

Mr. Coughlin: I think I should like to offer this as Plaintiff's exhibit 3.

Mr. Merrill: We object, it has data in handwriting that would be immaterial and is not proper on any map or chart. With such markings it would be incompetent, irrelevant and immaterial, we also object to all of that which is on the other side of the exhibit, it is prejudicial.

The Court: It seems there are some other matters on this report that have not been testified to in connection with license numbers and some other matters. The objection will be sustained at this time. [127]

The Court: At this time we will recess until tomorrow morning at 10. (Admonition to the jury.)

October 21, 1942

Q. Now, Mr. Bunderson, calling your attention to the other papers that were attached to the exhibit yesterday, did you use those papers in your testimony? A. No sir.

Q. I call your attention to the writing on the exhibit, you will explain that please?

A. They were notes that I took at the scene of the accident.

Q. In whose handwriting are they?

A. Mine.

Q. Where has this exhibit been kept since you made it? A. In the safe in my office.

(Testimony of A. P. Bunderson.)

Q. Where is that?

A. At the County seat, Paris.

Q. How does the sketch happen to be on the paper or card?

A. At the time I got to the scene of the accident I didn't have any other paper upon which to make the exhibit.

Mr. Merrill: We will object to it on the ground that it contains on the face and on the back matters not pertinent to the matter investigated here, and prejudicial. It is also incompetent, irrelevant and immaterial.

Mr. Black: We join in this [128] objection.

The Court: I think the notes should be explained as to whether they have anything to do with the matter before the Court. Sustained.

Q. Will you explain these notes and tell what they are.

A. Yes. The notes on here are the figures that I took, or rather they are figures of the measurements I took at the scene of the accident.

Q. Do they all pertain to the accident?

Mr. Merrill: We object to that explanation, in that it is not necessary in the sketch. It would be just as competent to permit him to go to the scene and write it up.

The Court: He should explain whether they apply to any matter here. For instance on this sketch there is a car license, I think it should be explained as to what the car license is. The objection will be sustained at this time.

(Testimony of A. P. Bunderson.)

Mr. Coughlin: May I approach the witness and point out these items?

The Court: Yes, you may.

Q. Now, I notice the figures 238 followed by the words "Steps", kindly explain that?

A. That indicates the measurements of the tracks. I walked back toward the car and I counted the steps up the middle of the road that I took from the time the car first left [129] the oil until it last left the oil.

Q. And the figures 6-40 explain that?

A. That is the time my investigation was completed.

Q. On that accident? A. Yes sir.

Q. License 3A 150 C, will you explain that?

A. That was the license number of the car.

Q. The wrecked car? A. Yes sir.

Q. 1941 Chevrolet, what does that mean?

A. That is the make and year of the car.

Q. This notation here "all done with the investigation", what does that refer to, and the figures 9-11-42? A. The date of the accident.

Q. And this notation "twenty miles north of Montpelier", will you explain that?

A. That was the estimated distance that I figured it was from Montpelier.

Q. The figures 769 and 82 for a total of 851?

A. That was the figures I used in adding up the distance that I measured on certain sections of the tracks on the road.

Q. That was in connection with this accident?

(Testimony of A. P. Bunderson.)

A. Yes sir.

Q. The figures 238 and 123 and then 714, what does that refer to?

A. The total amount of feet travelled. Those figures are what I used. [130]

Q. The notation culvert number 100, what does that refer to?

A. Those figures 100, 650, 414 x 15 were numbers on a culvert a short distance from where the car laid.

Q. Calling your attention to the sketch on the paper right here (indicating), what does that represent?

A. These lines you mean?

Q. Yes.

A. That is the tracks I measured.

Q. What are these two lines (indicating)?

A. The edge of the road, or rather the oil, the paved portion on both sides of the road.

Q. Now, the figures along the line?

A. The 117 represents the total amount of feet travelled after the car had left the west side of the oil until it came back on the oil.

Q. And what does the 177 refer to?

A. That is the amount or number of feet from the time it got on the west side of the oil until it left the east side of the oil again.

Q. The figure 146?

A. That is where it crossed the oil and came back off again.

Q. And this figure 66?

A. The distance before it came back on the oil.

(Testimony of A. P. Bunderson.)

Q. And the figure 92?

A. Where it crossed the oil from the west to the east.

Q. Now, the figure 82? [131]

A. That is the distance from the east side of the oil to where the car laid.

Q. And the figure 41 ft.?

A. That was the measurement from the oil straight to the car.

Q. What does this notation "car" with a box around it mean?

A. That *the* the way I diagram an automobile.

Q. 48 point 9, what does that have reference to?

A. I don't know.

Q. Was that made in connection with the accident? A. Yes sir.

Q. Are there any other figures or drawings on the exhibit other than I have asked about?

A. Yes sir.

Q. What is that?

A. 18 point 8, and that is the oil surface of the road. That is how wide it was at the place where it went off and the five feet in the shoulder from the oil to the shoulder of the road.

Q. Are there any other figures that we have not taken into consideration?

A. No sir, I don't think so.

Mr. Coughlin: Now, we offer the exhibit again.

The Court: Do you have any objection? [132]

Mr. Merrill: Yes, we renew our objection to the offer of the exhibit. It now plainly appears that

(Testimony of A. P. Bunderson.)

it contains matters, written data concerning which he has previously testified. It amounts now to a written statement of the testimony and not merely a map or plat of the condition found there but it contains considerable *data* that he has heretofore testified to. It is immaterial, irrelevant and it is incompetent to be introduced in that form.

The Court: It may be admitted.

Q. Now, Mr. Bunderson, will you kindly hold the exhibit up so the jury can see it and explain the exhibit to them?

Mr. Merrill: Now, we object to this, he has testified to it in all its details. It is incompetent, irrelevant and immaterial.

The Court: He may answer. A. These are tracks, and these marks here (indicating) are the sides of the oil. This arrow points north. These two marks as I say, are marks I drew to indicate the side of the oil. This is the place I measured across, it is eighteen feet and eight inches. This mark, I just made the drawing out here to show the amount of feet that the tracks came down in length here, the tracks led out here (indicating) and when it went back on the oil it was 117 feet. They came across the oil here and it was 177 feet and then they stayed off the oil for 166 feet and then [133] back across the oil again for a distance of 146 feet; then off the west side of the oil for a distance of 66 feet and crossed back on the east side of the oil again, and that distance was 92 feet, and then from the edge of the oil to where the

(Testimony of A. P. Bunderson.)

automobile laid was 82 feet. Then I measured from the car straight to the oil which is 42 feet. This figure five here is to represent the 5 foot shoulder on each side of the oil.

Q. Will you just describe the ground where the car was laying at that time, after the wreck?

A. It was just sage brush, open country.

Q. Calling your attention to exhibit 4 I will ask you what that is?

A. That is a picture of the wrecked automobile located in the Garage at Montpelier.

Q. Is that a faithful representation of the condition of the car after the accident?

A. Yes sir.

Mr. Coughlin: I will offer that in evidence.

Mr. Merrill: No objection.

Mr. Black: No objection.

The Court: Admitted.

Q. Now, I will ask you what this is?

A. That is a picture taken in the garage at Montpelier of the same automobile. [134]

Q. Is it a faithful representation of the condition of the car at the time it was taken after the accident?

Mr. Merrill: Objected to as leading and calling for a conclusion of the witness.

The Court: It may be leading, but he may answer. A. Yes sir.

Mr. Coughlin: We offer the exhibit in evidence.

Mr. Merrill: Objected to as incompetent, irrelevant and no proper foundation laid for its reception.

(Testimony of A. P. Bunderson.)

The Court: Admitted.

Q. Calling your attention to plaintiff's exhibit 6 I will ask you what it is?

A. It is a picture of the right side of the car. The same automobile.

Mr. Coughlin: We offer the exhibit in evidence.

Mr. Merrill: We object to that because it is immaterial, incompetent and irrelevant and no proper foundation is laid.

The Court: The objection is sustained as to the foundation not being laid.

Q. Does that picture fairly represent and is it a fair likeness of the car? A. Yes sir. [135]

Mr. Coughlin: We reoffer it.

Mr. Merrill: We renew our objection and we call the attention of the Court to the fact that there is a very distinct difference between the picture they first introduced with reference to the right wheel and this picture. This picture shows the car in a jacked up position and therefore tends to be misleading, not showing the true condition. There is no showing here that these pictures or this picture was taken at the time of the accident or that the car was in the same condition as it was at the time of the accident.

The Court: No,—that is true,—there is no showing that the picture was taken at the time of the accident, or a year before or a year after or anything of that kind. The objection is sustained.

Q. Mr. Bunderson, who took the the picture referred to.

(Testimony of A. P. Bunderson.)

A. Mr. Grey, a local photographer in Montpelier.

Q. At whose request did he take this picture?

A. Mine.

Q. Where is this car located as shown in the picture?

Mr. Merrill: Objected to as there is no testimony as to who was there and when it was taken.

The Court: He may answer.

A. You mean when the picture was taken, where was the car at that time?

Q. Yes. [136]

A. In the Ford Garage.

Q. In Montpelier. A. Yes sir.

Q. How long after the wreck, if you know, was it taken?

Mr. Merrill: Objected to as the question calls for a conclusion. Unless the man was present he would not know and there is no testimony that he was present.

The Court: He may answer, if he knows.

A. Next day.

Q. Did you see the car there the next day?

A. Yes sir.

Q. Is that a fair representation of the way the car looked after the accident?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial, and upon the ground that no proper identification of the picture or the car has yet been had.

(Testimony of A. P. Bunderson.)

The Court: I think he testified that it was a picture of the car. However, the question seems to be leading and I still sustain the objection.

Mr. Coughlin: We will reoffer the picture.

Mr. Merrill: We offer the same objection. There is no testimony that this man was [137] present when the picture was taken.

The Court: Objection overruled, it may be admitted.

Q. Mr. Bunderson, do you know Mr. L. R. Donnelly?
A. Yes sir.

Q. Where did you first meet him?

A. In Montpelier, Idaho.

Q. Will you describe the circumstances under which you met Mr. Donnelly?

A. It was nothing particular only he just came up and introduced himself and told me that——

Mr. Merrill: We object to any further answer that he is attempting to make now, he has answered the question and any further answer would not be responsive.

Mr. Coughlin: Very well.

Q. When did you meet him?

A. It was the next day or two after the accident.

Q. Have you testified where you met him?

A. No sir.

Q. Where did you meet him?

A. I don't remember.

Q. How did he introduce himself.

A. Just by telling me his name and handing me his card.

(Testimony of A. P. Bunderson.)

Q. State what he said. [138]

Mr. Merrill: We object to that as repetition.

Mr. Coughlin: We will ask to have this card marked.

Q. Now, calling your attention to what has been marked as Plaintiff's exhibit 7, I will ask you what it is?

A. That is the card Mr. Donnelly gave me at the time we met.

Mr. Coughlin: We offer this exhibit in evidence.

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial for any purpose whatever.

The Court: It may be admitted.

Q. At the time you made your investigation of the accident was Mr. Hair present? A. No sir.

Q. Was he present at any time that you were at the scene of the accident? A. Yes sir.

Mr. Coughlin: You may cross examine.

Cross Examination

By Mr. Black.

Q. Mr. Bunderson, when did you first learn of this accident?

A. You mean the day or the time.

Q. What day and what time?

A. I think it was the 11th of September, and it was about five or five-thirty in the afternoon. [139]

Q. Did someone inform you that there had been an accident? A. Yes sir.

Q. Do you remember who that was?

A. I think it was the Chief of Police at Montpelier.

(Testimony of A. P. Bunderson.)

Q. What did you do then?

A. I asked him where the accident was and he told me it was over the Georgetown divide. He said that the party who phoned in wanted me to come out immediately and I went out.

Q. Were you in Montpelier or in Paris?

A. In Montpelier.

Q. You didn't do anything except go out there, —you just got in your car and went out there after you heard about it, is that right.

A. Yes sir, that is right.

Q. And when did you make the investigation, right away? A. Yes sir.

Q. Who was with you?

A. Willard Bruce and Glen Coughlin.

Q. You were the Sheriff at that time?

A. Yes sir.

Q. How did Mr. Coughlin happen to be with you?

A. He was standing on the sidewalk with Mr. Bruce and the Chief at the time I drove up to the Police Station.

Q. So he goes along with you out to the scene of the accident? A. Yes sir. [140]

Q. Who was Mr. Bruce?

A. The principal of the elementary schools at Montpelier.

Q. Is he here in the Court room?

A. No sir.

Q. The estimated distance, which you had, from

(Testimony of A. P. Bunderson.)

this accident to Montpelier, or from Montpelier out to the accident was twenty miles? A. Yes sir.

Q. How far is it from Montpelier to Soda Springs? A. About thirty-two miles.

Q. You didn't make any arrangements about the wrecker before you left town?

A. I don't remember.

Q. Don't you know that Mr. Hair himself went and made arrangements about the wrecker coming out there, and that he came out with it?

A. I think that is right, yes sir.

Q. When the wrecker arrived Mr. Hair was with them? A. Yes sir.

Q. Had you made these measurements before Mr. Hair got out there? A. Yes sir.

Q. Did you make any at all after he was there?

A. No sir.

Q. How long a time was it that you were there making the measurements and so forth before Mr. Hair arrived? [141]

A. I had been through with the measurements for several minutes when he came.

Q. Did you show him the measurements you had made, or anything of that kind? A. No sir.

Q. Did you tell him about the measurements you had made? A. Not that I remember.

Q. Did you take him over the scene of any of these measurements? A. No sir.

Q. Did you discuss these measurements with him in any way? A. Not that I remember.

(Testimony of A. P. Bunderson.)

Q. Did you look at the car before the wrecker picked up this car? A. Yes sir.

Q. Did you look at it and examine it before the wrecker picked it up?

A. No, I didn't examine it.

Q. Did you do anything with the car before the wrecker man came there? A. No sir.

Q. And it was in the same position when he got there as it was when you got there?

A. Yes sir.

Q. Did you notice the tires on this truck when you made the investigation?

A. I noticed one front tire was down. [142]

Q. Which one?

A. I think it was the right one.

Q. Did you notice its condition?

A. It was down.

Q. Did you notice the condition of the tire itself?

A. No sir.

Q. You didn't notice whether it was torn, or had a hole in it? A. No sir.

Q. And you didn't afterward examine it for that purpose? A. No sir.

Q. Did you make an investigation to see what caused this tire to be down? A. No sir.

Q. Were the other tires on the car inflated?

A. Yes sir.

Q. Did you notice their condition as to whether they were smooth, or did you notice the condition of their tread? A. No sir.

Q. Anyone in the car when you got there?

(Testimony of A. P. Bunderson.)

A. No sir.

Q. Were there any people around there?

A. No sir, Oh! yes, there was one other person.

Q. Who was there? A. Mr. Bacon.

Q. Where does he live? [143]

A. At Georgetown.

Q. Is he here in Court? A. No, sir.

Q. Then, during the entire investigation there was you and the two gentlemen, Mr. Coughlin here and Mr. Bruce, and Mr. Hair came up with the driver of the wrecker.

A. Yes, he came with the wrecker.

Q. Who was the driver of the wrecker?

A. Mr. Oxenbine.

Q. From what garage?

A. The Ford Garage in Montpelier.

Q. You don't have any personal recollection of what time of day the accident actually occurred?

A. No, sir.

Q. When you got there I think you said there was some merchandise scattered around the scene of the accident. A. Yes, sir.

Q. What did it consist of?

A. There was a lot of chewing tobacco but I don't recall the make. The only thing that I remember is the Camel cigarettes.

Q. Did you notice whether they were wet or dry? A. No, sir.

Q. They were in close proximity to the car?

A. No sir, they were scattered all around there.

Q. Did you help pick them up? [144]

(Testimony of A. P. Bunderson.)

A. Yes sir, after the wrecker got there I helped.

Q. Do you remember them being wet?

A. No sir.

Q. You don't remember them being wet or dry?

A. No sir.

Q. You stated that the shoulders along this place were approximately how wide, on either side.

A. About five feet.

Q. What kind of texture are those shoulders?

A. Gravel surface.

Q. What was the condition as to their being soft, or being wet?

A. They were wet.

Q. And soft?

A. The top was soft.

Q. Where the right hand wheels were off the right hand side of the pavement did you notice how far the tires sank into the shoulder?

A. I noticed how far but I cannot tell how far.

Q. They did sink into the soft shoulder as they went off the oil or pavement?

A. Yes sir.

Q. According to your drawing the right hand wheels were off the pavement on the right hand side twice?

A. Yes sir.

Q. That is correct, is it? [145]

A. Yes sir.

Q. The condition of the shoulder was the same all along there so far as being wet and soft?

A. Yes sir.

Q. How about the condition of the shoulder on the other side as to being wet and soft?

A. The same way.

Q. Did you measure the width of the oil, the hard surface of the road?

A. Yes sir.

(Testimony of A. P. Bunderson.)

Q. What was the width?

A. I don't remember exactly but I believe it is eighteen feet and eight inches, it is there on the plat.

Q. Did you measure more than in one place?

A. No sir.

Q. Is the width the same all along there so far as the oil surface is concerned?

A. I think so.

Q. What kind of surface is that?

A. Hard oil surface.

Q. Smooth? A. Yes sir.

Q. Now, the road along there, were there any curves near the accident? A. No sir.

Q. Did you notice particularly?

A. Yes sir. [146]

Q. You show a curve off to the right hand, at the bottom of the exhibit, is that a correct representation? A. No sir.

Q. That curve should not be there as to showing how the highway was, that is, as to being straight or crooked. A. No sir.

Q. It should not be there, that is correct?

A. That is right.

Q. In other words prior to the truck going off the highway the first time, there was nothing to indicate but what it was going in a straight line, that is, straight along the highway, so far as you know? A. That's right.

Q. Before it went off the highway?

A. That's right.

Q. You didn't look at any marks north toward

(Testimony of A. P. Bunderson.)

Soda Springs, north of where you made this investigation? A. Off the oil or on?

Q. Off the oil. A. No sir.

Q. Were there any tracks other than those tracks you have marked on the map? A. No sir.

Q. Were these marks like the marks you have on the map, that is, were they distinct all the way or just in places? A. All of the way. [147]

Q. All the way? A. Yes sir.

Q. On the right hand or the left hand side or double tread marks all of the way. Were they tracks of both wheels all of the way?

A. No, part of the way.

Q. On which side was the mark continuous, on the right or the left, if it was continuous?

A. You mean the tracks of the car?

Q. Yes.

A. I would say it was continuous until the last time it crossed the road.

Q. Were they both continuous all of the time until it crossed the road the last time?

A. Yes, they were both continuous until the last time they crossed the road.

Q. If the pavement had been dry would there have been a mark such as you saw there? If the pavement had been dry at the time they were made? A. I doubt it.

Q. And that would indicate that at the time the marks were made the pavement was wet.

A. Yes sir.

Q. I think you said that the oil part of the road looked dry when you got there. [148]

(Testimony of A. P. Bunderson.)

A. It was dry.

Q. You don't know how it was when this car made these marks? A. No sir.

Q. Do you know whether it rained that afternoon in Montpelier? A. I don't remember.

Q. Now, did Mr. Coughlin or Bruce assist you in any way in making this investigation?

A. Mr. Bruce did.

Q. He was with you all of the time in making these measurements? A. Yes sir.

Q. What else did you do besides the measurements in making the investigation?

A. Well, I just took the measurements and observed as much as I could see.

Q. Did you go to the end to see or observe where the car went off the pavement? A. Yes sir.

Q. Mr. Coughlin was along?

A. I don't remember.

Q. Mr. Bruce was along? A. Yes sir.

Q. When did you make this map?

A. At the time I was at the car. I looked at the car and then I went up to my car and got the steel tape and walked along,—I got this piece of paper out of the car and we walked along and made the measurements and [149] made these figures as we went along.

Q. And that has not been changed since?

A. No sir.

Q. These are in your hand writing (indicating)

A. Yes sir.

Q. Examine them.

A. Yes sir, they are mine.

(Testimony of A. P. Bunderson.)

Q. What do you mean by the statement when you say "all alone with the investigation"?

A. What was that?

Q. What do you mean by this statement, you say "all alone with the investigation", were these other people with you?

A. I think you read that wrong.

Q. What does it say.

A. All done with the investigation at six-forty.

Q. Have you had any experience in driving a car or truck with a tire blown out?

A. Not a truck.

Q. Not with a truck as heavy as this?

A. No sir.

Q. You have with a car?

A. I don't remember of having a blow-out on a car.

Q. So from any personal experience you don't know what a car does if a tire blows out?

A. That's right.

Q. You don't know what effect it has on a car or truck from [150] actual experience.

A. Yes sir.

Q. But I assume from your answers that you have not been in a car when it was driven and a tire blew out?

A. If I have I don't remember it.

Q. Did you notice anything about the weight of this truck?

A. No sir.

Q. Did you notice anything about what kind of a load was in the back end of this car?

(Testimony of A. P. Bunderson.)

A. Yes sir.

Q. What was that condition?

A. Well, it was loaded so that we had quite a time getting all the merchandise back in the truck.

Q. After it was taken out you had to work hard to get it back?

A. It had broken the big boxes that the cartons of cigarettes were in and we had to throw them back in.

Q. You don't know what the weight of the back end of the car was compared with the other part of the load?

A. No, sir.

Q. Along this highway was there any borrow pits?

A. Yes, sir.

Q. On which side?

A. Both.

Q. About what was the extent of the borrow pit on the east [151] side? What was the extent of the borrow pit where the truck went off?

A. The borrow pit was deeper there than it was where the car first went off.

Q. How wide was the borrow pit at that point?

A. I didn't measure them.

Q. How deep was it?

A. I say, I didn't measure them.

Q. What is your best judgment as to how deep the borrow pit was at the point where the car went off?

A. From the top of the road?

Q. From the edge of the road?

A. I would approximate it about two and a half feet deep.

(Testimony of A. P. Bunderson.)

Q. At that point did the borrow pit go off abruptly? A. No, sir.

Q. But a car in going over there,—did this car go over straight across the highway or at an angling position? A. The last time, you mean?

Q. Yes. A. At an angle.

Q. A car or truck going over there in an angling position, what effect would it have on the car as to tipping or rolling?

A. That would depend on how the car went down over.

Q. It would have a tendency to twist or roll the car? A. I think so. [152]

Q. The borrow pit on either side of the road where this accident occurred,—was it about the same on both sides?

A. It wasn't as deep the first and second times the car crossed the road.

Q. But there was a borrow pit along all the places you have marked on this map? A. Yes, sir.

Q. Do you know how wide this truck is?

A. No, sir.

Q. You never measured that? A. No, sir.

Q. Was there any line in the middle of the paved part of the highway there showing where the middle of the paved part of it was?

A. Not that I noticed.

Q. On your exhibit you have some kind of line through the middle, you don't mean that there was anything on the pavement that would mark the middle?

(Testimony of A. P. Bunderson.)

A. I cannot recall what that marking is.

Q. At the present time you don't remember any mark there in the middle or the center of the highway?

A. No, sir.

Q. Counsel asked if you saw any stones along the right hand side of the highway,—did you look for any?

A. No, sir.

Q. They could have been there and you would not have seen [153] them?

A. They would have to be very small.

Q. But they could be there?

A. I doubt it.

Q. Does it take a big stone to cut a tire?

A. No, sir.

Q. A little one can cut a tire?

A. Yes, sir.

Q. You don't know whether there was a stone there such as would cut a tire?

A. No, sir.

Q. Did you examine the shoulder all along there, the oil and the shoulder to see whether it was rough or smooth?

A. Yes, sir.

Q. What was its condition?

A. Smooth.

Q. When you get off the oil and tried to get back do you know of tires being bruised from this sort of experience?

A. Yes, sir.

Q. That could happen even where there is a shoulder such as was along there?

A. I wouldn't know about that.

Q. You wouldn't know about that?

A. No, sir.

Q. I think you said there was a culvert near where this [154] car came to a stop?

A. Yes, sir.

(Testimony of A. P. Bunderson.)

Q. Nearer to Montpelier or toward Soda Springs? A. Toward Soda Springs.

Q. How near to where the car came to a stop was it? A. I didn't measure it.

Q. You didn't measure that? A. No, sir.

Q. Do you have any personal recollection of it now? A. Yes, sir, I recall the culvert.

Q. What is your recollection of the distance?

A. About forty feet.

Q. What kind of a culvert is that?

A. One of the galvanized culverts.

Q. Does it have any rims or ends sticking up above the surface of the pavement?

A. No, sir.

Q. It does not stick out past the end of the shoulder on each side? A. A little.

Q. That would be visible if you were driving along there? A. Yes, sir.

Q. You could see that sticking out?

A. Yes, sir.

Q. I understand you were not present when any of these pictures were taken?

A. That's right. [155]

Q. The photographer took them himself?

A. Yes, sir.

Q. You had nothing to do with arranging the car when the pictures were taken? A. No, sir.

Q. All that you know is that they were taken, and that these are the ones? A. Yes, sir.

Q. You don't know when they were taken?

(Testimony of A. P. Bunderson.)

A. Yes, sir.

Q. When were they taken?

A. The next day.

Q. How do you know?

A. The photographer told me he would go right down.

Q. You don't know whether he took them the next day or the second day?

A. No, sir, I don't know for sure.

Q. When did you first see these pictures?

A. I don't remember when I got them from the photographer's.

Q. How long was the car in the garage at Montpelier?

A. I wouldn't know.

Q. You don't know when it was moved?

A. No, sir.

Q. You don't know whether the mechanics did anything to the car before it was moved?

A. No, sir. [156]

Q. You don't know who took it away?

A. No, sir.

Q. You didn't examine the car after it was in the garage, as to the tires?

A. No, sir.

Mr. Black: I think that is all.

Cross Examination

By Mr. Merrill:

Q. Mr. Bunderson you made an investigation of the accident on the ground, that day?

A. Yes, sir.

Q. You endeavored to acquire all the information you could as to everything connected with it?

(Testimony of A. P. Bunderson.)

A. Just about.

Q. You made a report to the Department of Law Enforcement at Boise, Idaho? A. Yes, sir.

Q. You sent a copy of the report and kept the original in your office? A. Yes, sir.

Q. You have that report with you now?

A. Yes, sir.

Q. That was the report you had in your hands yesterday when you were testifying?

A. Yes, sir. [157]

Q. Now, Mr. Bunderson you made out a report on the ground did you? A. No, sir.

Q. Where did you make it,—the report, where did you make it out?

A. I think these two reports were made out in the Police station in Montpelier.

Q. Was Mr. Hair there when the reports were made out?

A. This report (indicating) he was.

Q. Are these copies of the reports you sent to Boise?

A. No, sir, I don't think so. I think these are the reports I had in the police station gathering my information and completing the report.

Q. In this you say the car number was 3A150.

A. The car license and that was right.

Q. You say the car was going south.

A. I saw tracks leading south.

Q. You say it was raining.

Mr. Davis: You have a right to look at the report if you want to.

(Testimony of A. P. Bunderson.)

Mr. Black: Yes, he has that right.

Q. Do I have a right to look at the report?

The Court: If you want to, you have the right to look at it.

Q. Isn't it a fact Mr. Bunderson, that the report you sent [158] to Boise was signed by both yourself and Mr. Hair? A. I don't remember.

Q. Isn't it a custom to do that?

A. Yes, sir.

Q. That is the usual custom? A. Yes, sir.

Q. Isn't it a fact that on the report you sent to Boise there was contained Mr. Hair's statement as well as your notations as to what you found on the scene of the accident? A. I don't know.

Q. Isn't that the usual custom?

A. Either one or both are ways to send in reports.

Q. Isn't that the usual custom?

A. I don't know.

Q. Isn't it the general way to make out a report and that both you and the party involved in the accident sign it? A. Yes, sir.

Q. And then you send that report to the Boise office? A. Yes, sir.

Q. That is the usual custom? A. Yes, sir.

Q. That was done in this instance?

A. I don't know.

Q. You wouldn't say that it wasn't?

A. Not until I looked at the report. [159]

Q. Why did you keep two copies of this report in this case?

(Testimony of A. P. Bunderson.)

A. I think they are part of my rough sketch and the information gathered.

Q. Isn't it a fact that you have made up one since the accident and the other about the time of the accident? A. I don't know.

Q. You wouldn't say that you didn't do that. That has been marked as an exhibit. Is not that a duplicate of the report that you sent to the Boise office? A. I don't know.

Q. It is a report that you made up.

A. This is the report that Mr. Hair filled out for me.

Q. Did you make that out on the front?

A. No, sir.

Q. I hand you exhibit 9 now, and I will ask you did you make that out? A. Yes, sir.

Q. Now, is there any difference on the front of these two?

Mr. Davis: I submit that the reports speak for themselves.

The Court: I think that is correct unless you point out some special matter in the report.

Q. Mr. Bunderson, exhibit 8, is that one you made out?

A. No, sir,—just a minute, wait a minute. Exhibit 9 was made by me. [160]

Q. That was made by you after the investigation?

A. Yes, sir.

Q. Now look on the front of it, it says "estimated speed before accident 40 miles."

A. That is what Mr. Hair told me.

(Testimony of A. P. Bunderson.)

Q. That is what you determined it to be, and so made the report?

Mr. Davis: I submit that the witness may explain. A. No, sir.

Q. Why did you make the report to that effect?

A. Because I asked Mr. Hair the speed because he was there.

Q. You put in that estimated speed at the time of the accident was thirty miles an hour?

A. Yes, sir.

Q. And that is what you reported?

A. Yes, sir.

Q. You also put on there lawful speed 40 miles?

A. Yes, sir.

Q. That is what you put on there?

A. Yes, sir.

Q. And also maximum safe speed under conditions prevailing fifty miles an hour?

A. Yes, sir.

Q. And that was a fact? A. Yes, sir. [161]

Q. And you so put it on the report?

A. Yes, sir.

Q. You also marked on there to the effect that it was raining? A. No, sir.

Q. Don't you see that on there?

A. Yes, sir.

Q. You reported to the Boise office?

A. I didn't put it on the back.

Q. On either of them? A. No, sir.

Q. Do you mean to say that you filled out the front of one and Hair the front of the other?

(Testimony of A. P. Bunderson.)

A. Yes, sir.

Q. On the back of the report you made out appears the mark opposite the word "raining".

A. I never filled the back.

Q. On the back of the exhibit you said you mailed a copy of to Boise it bears a mark opposite the word "raining".

Mr. Davis: My recollection is that he didn't say that he mailed a copy to Boise. He said that he didn't know.

A. I don't know what report that is, you keep saying the one you mailed to Boise.

Q. On the one that you have Mr. Bunderson, that you said you sent to Boise. [162]

A. I didn't say either of these was a copy.

Q. But that appears on these copies?

A. Yes sir, it does.

Q. These copies both have been in your possession since the time of the accident? A. Yes, sir.

Q. And you brought them to Court?

A. Yes, sir.

Q. You had them attached to exhibit 3 that was introduced in evidence? A. Yes, sir.

Q. And detached them here? A. Yes, sir.

Q. They are a part of your records?

A. Yes, sir.

Q. And a part of the files that you have kept in this case are they not? A. Yes, sir.

Mr. Merrill: We offer in evidence exhibits 8 and 9,—defendant Tobacco Company's exhibits 8 and 9.

(Testimony of A. P. Bunderson.)

Mr. Coughlin: We have no objection.

The Court: That may be admitted.

Mr. Merrill: I want to read parts of this to the jury. [163]

Mr. Davis: If the exhibit is going to be read I suggest that it all be read and not just a part of it.

Mr. Merrill: It would be hard reading it all, it contains some matters that are pertinent here and many matters that are not, and are immaterial for any purpose. It would take an hour to read it all.

The Court: The exhibit will be before the jury in its entirety, and I doubt that any certain part of the exhibit should be called to the attention of the jury.

Mr. Merrill: If that is the ruling of the Court that I will read the whole report. The heading reads, "Mail report to Department of law enforcement, Boise, Idaho" and the portion of the report that is filled out by the officer, "accident occurred in Bear Lake County. Twenty miles north of Montpelier, Bear Lake County. Indicate exact mileage or distance, using two mileages and two directions if necessary. Accident occurred on 30 N U. S, check class of highway. At intersection with" and that is blank. "Time of accident, day, Friday, date, 9-11-1942, time 4:15 P. M." under the heading "your vehicle, No. 1" "Year and make, 1941 Chevrolet panel, car license number 3A 150 going south on highway 30 N. Parts of vehicle [164] damaged, all body, amount \$600.00, driven by R. D. Hair 209 South seventh, Pocatello, Idaho, phone 2788W, age

(Testimony of A. P. Bunderson.)

thirty, sex male, color white, driving experience twelve years, number of passengers, one, operators license number 170832, owned by L. R. Donnelly Address, 532 Judge Building, Estimated speed before accident 40 estimated speed at moment of accident 30, lawful speed 40, maximum safe speed under conditions prevailing 50." The next part under the heading "vehicle no. 2" is all blank. The next part of the report under the heading "injured" "Name Avenell Newby, age 28, address Montpelier Idaho, taken to Bear Lake Clinic, give exact location in vehicle, right side, in vehicle number 1." The next where there is anything marked by the officer, is in a square opposite "going straight ahead" On the other side of the report: "had not been drinking not marked; had been drinking, if so, not marked; obviously drunk, not marked, ability impaired, not marked; ability not impaired, not marked; not known whether impaired, marked. Traffic control, no control, marked; Weather, raining, marked; daylight, marked; Condition of vehicle, no defects, marked. Kind of locality, open or other, marked; Roadway character, straight road, marked; Hill crest, marked; Type and condition of surface, oil, marked; Describe accident, also use this space for data on third vehicle, additional witnesses or [165] injured persons and explanation of questions not fully answered by checking in the boxes provided. While traveling south on Highway 30 N, and 22 miles north of Montpelier I met a semi truck trailer

(Testimony of A. P. Bunderson.)

riding a little over the yellow line. In order to pass I rode my two right wheels on the shoulder which was soft with rain which put my car out of control. While it was out of control I hit a rock blowing my right front tire and causing my car to roll over. R. D. Hair, 209 So. 7th 9/11/42''.

Mr. Davis: Which one did you read, exhibit 8 or 9?

Mr. Merrill: I read exhibit 8.

Q. Now, Mr. Bunderson, on your map you show a yellow line in the center of the oiled portion of the highway. You didn't testify that any such line existed, what is the fact? A. I don't know.

Q. Why did you make a yellow line on the map?

A. Sometimes when I make a report I make a yellow line down the center and measure from the yellow line to the edges.

Q. Now, look at your exhibit 3 and you will observe a marking of the yellow line.

A. Yes, sir.

Q. It is shown in the middle of the highway.

[166]

A. Yes sir.

Q. Was there or was there not a yellow line on the highway? A. I don't know.

Q. Why would you put it on if there wasn't any?

A. There must have been one or I wouldn't have put it on.

Q. What is your best judgment, or your explanation for it?

(Testimony of A. P. Bunderson.)

A. I don't remember a yellow line.

Q. Now, Mr. Bunderson, tell me, do you or do you not remember a yellow line on there?

A. No sir.

Q. Why don't you remember whether there was a yellow line?

A. Well, I recall measuring the width of the highway.

Q. You remember everything else, did you recall a yellow line? A. No sir.

Q. But still you put it on your map?

A. Yes sir.

Q. The shoulder of that highway was built or constructed of gravel or dirt? A. Yes sir.

Q. You have seen roads under construction?

A. Yes sir.

Q. You know that dirt and rock is used in the basic part of the road? A. Yes sir.

Q. You know that there are rocks in the shoulders of an oiled road? [167] A. Yes sir.

Q. When this car went off the side of the road it made a perceptible marking on the shoulder.

A. Yes sir.

Q. How deep was that rut, do you know?

A. No sir.

Q. Did you take any measurements of that?

A. No sir, I looked at it.

Q. You know that it was perceptible and a well defined mark. A. Yes sir.

Q. The edge of the oiled surface was very rough?

A. I didn't observe that.

(Testimony of A. P. Bunderson.)

Q. But don't you know that from experience Mr. Bunderson, that the edge of an oiled highway is rough, generally? A. I didn't notice that.

Q. Isn't that your general information touching the construction of such highways?

A. Is is and it isn't.

Q. What do you mean by that?

A. Well, some parts of the highway is what you asked about and some isn't. I didn't notice anything along there.

Q. You didn't make any investigation of that?

A. Yes sir.

Q. What did you do?

A. I found that the oil led right to the gravel.

Q. You found gravel there? [168]

A. Yes sir.

Q. Did you determine, with Mr. Donnelly, that the tire had been cut and blown out?

A. Not that I remember.

Q. Didn't you make an explanation to Mr. Donnelly how this accident had happened, as a result of your investigation?

A. Not that I remember.

Q. Do you remember meeting with Mr. Donnelly on a Sunday afternoon in September, in the office of the Chief of Police?

A. I remember meeting him.

Q. And in that conversation did you say in substance in answer to a question: "What do you think caused the accident" and you you said: "from looking over the tracks the car made, it looked like

(Testimony of A. P. Bunderson.)

the car had been crowded off the road on the soft shoulder and while Mr. Hair was trying to control the car while being on the soft shoulder the right front wheel or tire apparently hit a sharp object which then threw the car completely out of control and the car turned over". A. No sir.

Q. Did you tell him that in substance and effect?

A. No sir.

Mr. Merrill: That is all.

Redirect Examination

By Mr. Coughlin: [169]

Q. Mr. Bunderson, what is your opinion as to when the tire blew out?

Mr. Black: We object to that, the witness said he didn't know it had blown out.

Mr. Coughlin: They brought that out.

Mr. Black: We brought it out that he didn't know, that he didn't notice the tire.

The Court: Objection sustained.

Q. Mr. Bunderson, did you make any statement whatever to Mr. Donnelly concerning the cause of the accident? A. No sir.

Q. Were there any rim marks on the oiled portion of the road there at the scene of the accident?

A. Not that I noticed.

Q. How far was the road straight there at the scene of the accident?

A. I would say a half a mile or a mile either way.

Q. A half mile or a mile. A. Yes sir.

Q. And what do you mean when you say "either way"?

(Testimony of A. P. Bunderson.)

A. From the accident, north and south.

Q. Where was Mr. Hair when he came on the scene of the accident?

A. He was in the cab of the wrecker.

Q. Did he ever get out of the wrecker during the time you were there? [170]

A. I don't remember.

Q. Did Mr. Hair make any comment to you about the accident? A. No sir.

Q. Did he ask you to make any investigation?

A. No sir.

Q. Did he say anything to you about rocks being in the road? A. Not at the accident.

Q. At that time did he say anything to you about being crowded off the road by a semi-trailer?

A. Yes sir.

Q. At that time? A. Yes sir.

Q. Were there a number of paper cartons of merchandise in the truck?

Mr. Merrill: Objected to as not proper redirect.

Mr. Coughlin: Yes, I think that was answered.

The Court: Yes, I think you brought that out.

Q. Mr. Bunderson, in your opinion would an automobile going off into the borrow pit have a tendency to blow out a tire?

Mr. Merrill: Objected to as there has been no qualification shown, and it calls for a conclusion of the witness. [171]

The Court: He may answer.

Mr. Black: We join in that objection and also on the ground that it is incompetent, irrelevant and

(Testimony of A. P. Bunderson.)

immaterial in view of this witness's testimony that he made no investigation as to whether the tire blew out, and no experience by this witness of driving a car when the tire blew out.

The Court: He may answer, the Court has ruled.

A. I wouldn't know.

Q. Directing your attention to the marks on the highway, would certain of these marks have been made whether or not it was raining?

Mr. Merrill: We object to that on the ground that it is so indefinite we cannot know what he means.

The Court: Sustained, he has gone into that fully.

Mr. Coughlin: That is all.

Recross Examination

By Mr. Black:

Q. Did you talk with Mr. Hair at the place of the accident after he arrived there?

A. Yes sir.

Q. Did you ask him how the accident happened?

A. I don't remember the conversation between me and Hair, [172] but I know we talked a few minutes.

Q. Is that the place he told you that a semi-trailer crowded him off the road?

A. I think it was.

Q. And you didn't ask him about any rocks or things of that kind that you remember of now?

A. No sir.

(Testimony of A. P. Bunderson.)

Q. So far as you remember now, that is about all of the conversation that you remember?

A. Yes, it has been quite a while ago.

Q. Did you talk with him down town that evening, or the next day?

A. Yes sir, that evening.

Q. That evening,—did he again make *again make* any statement that he had been crowded off the highway by a semi-trailer?

A. I don't remember.

Q. If it is on that report that you brought in here would that indicate that you had such a conversation?

Mr. Coughlin: That is objected to as calling for a conclusion of the witness. The report that is in is in Mr. Hair's hand writing.

The Court: He may answer.

A. Yes sir.

Q. Did you see Mr. Hair write on the report? The part that is written in his hand writing on the report? A. Yes sir. [173]

Q. Where was that made?

A. In the Police station at Montpelier.

Q. You were there? A. Yes sir.

Q. When was it with reference to the accident, the same evening or the next day?

A. I think it was the next day.

Q. Was Mr. Hair present when you made your report to the State Law Enforcement Department that has been introduced in evidence?

A. No sir.

(Testimony of A. P. Bunderson.)

Q. He was not present? A. No sir.

Q. Who was present when you made that?

A. Nobody that I remember. That was in my office in Paris.

Q. That was made in your office?

A. Yes sir.

Q. That was put on there from your investigation and whatever you got from Mr. Hair?

A. Yes sir.

Q. You were familiar with the speed that was permissible on that highway? A. Yes sir.

Q. You had been a State Law Enforcement officer before you became Sheriff?

A. Yes sir. [174]

Q. It was a part of your duty to know what speed was permissible along portions of the highway that you were patrolling? A. Yes sir.

Mr. Black: That is all.

Recross Examination

By Mr. Merrill:

Q. With respect to the conversation you had with Mr. Donnelly on September 13, 1942 did you talk about the accident? A. I think so.

Q. Do you remember what you did talk about?

A. No sir.

Q. Isn't it true that he inquired how the accident happened? A. I don't remember.

Q. Do you remember anything about the conversation? A. No sir, I don't.

Q. Then why do you deny having said what I read to you?

(Testimony of A. P. Bunderson.)

Why do you deny the conversation I asked you about?

A. Because I don't remember telling him.

Q. Well, did you or did you not?

A. I didn't.

Q. And you say that now, when you don't remember what was said at that time at all?

A. I don't remember of it.

Q. Did Mr. Donnelly just make a social call?

A. We talked about the wreck but I don't remember that he [175] said.

Q. You talked about the wreck?

A. Yes sir.

Q. Mr. Donnelly asked you how it happened?

A. I don't remember.

Q. You had made an investigation?

A. Yes sir.

Q. Mr. Donnelly came in and you talked to him about how it happened and what you found?

A. As I remember we talked about the accident.

Q. Mr. Donnelly asked you how it happened?

A. I don't remember that.

Q. And then you told Mr. Donnelly just exactly what I read to you? A. Not that I remember.

Q. Will you say you did or did not?

A. I say I didn't.

Mr. Merrill: That is all.

DR. R. B. LINDSEY

Being called as a witness on the part of the plaintiff after being first duly sworn testifies as follows:

Direct Examination

By Mr. Coughlin:

Q. State your name.

A. R. B. Lindsey.

Q. Where do you reside? [176]

A. Montpelier.

Q. How long have you lived there?

A. Most of my life and continuously since 1937.

Q. What is your profession?

A. Physician and surgeon.

Q. Are you a graduate of a recognized medical school? A. Yes sir.

Q. How long did you attend.

A. Seven years.

Q. From what school did you graduate?

A. Northwestern University, medical school.

Mr. Black: We will admit that *he a* practicing physician and will admit his qualifications.

Mr. Merrill: We join in that.

The Court: The record may show his qualifications are admitted.

Q. Do you know, or did you know Avenell Newby? A. Yes sir.

Q. Did you have occasion to treat her during the year 1942? A. 1942, yes sir.

Q. When was that?

A. It was on September 11, 1942.

Q. State the circumstances.

A. She was brought into the hospital. At that

(Testimony of Dr. R. B. Lindsey.)

time she was unconscious,—she was in an unconscious condition following an automobile accident.

[177]

Q. Who brought her in?

A. Mike McGuire.

Q. Go ahead.

A. Mr. McGuire came into the office and told me he had a lady in his car that he rescued from a wreck north of Montpelier, but that he couldn't get her into the hospital alone. I went down and helped him. She was unconscious at that time and we put her to bed.

Q. Did you make an examination of her at that time? A. Yes sir.

Q. What did you determine was the extent of her injury?

A. She had a marked crushing of the chest and abdomen with internal injuries.

Q. How long was she in the hospital?

A. From memory I think she was there about four days.

Q. What happened then?

A. She died after being there four days in a semi-conscious condition. She expired.

Q. What was the cause of her death?

A. It was internal injuries in my judgment. Numerous internal injuries.

Q. Did you know Mrs. Newby before this time?

A. Yes, sir, I have met her,—I had met her before.

(Testimony of Dr. R. B. Lindsey.)

Q. Had you had occasion to treat her before?

A. Yes sir.

Q. You say you had treated her before? [178]

A. Yes sir.

Q. What was the condition of her health at this time?

A. She was in very good physical condition except that she called me in for the treatment of an ordinary cold.

Q. Do you know her age?

A. She was approximately twenty-eight years old.

Q. Do you know what her life expectancy was or would be?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial and no proper foundation is laid.

Mr. Davis: This Doctor's qualifications were admitted.

Mr. Merrill: This is an actuary qualification and we didn't admit that he was qualified as an insurance adjuster.

Q. Doctor are you familiar with the table showing the life expectancy?

A. I am fairly familiar with them. I have never made any specialty of that branch.

Q. Are you able to state what her life expectancy was?

Mr. Merrill: We object to that no qualification is shown and the table would be the best evidence.

The Court: He may answer this question yes or no.

(Testimony of Dr. R. B. Lindsey.)

A. No.

Mr. Coughlin: You may examine. [179]

Cross Examination

By Mr. Black:

Q. You say Mrs. Newby was in an unconscious condition when she was brought into the hospital?

A. Yes sir.

Q. Did she remain in that condition until she passed away?

A. Not completely. She was completely unconscious when we took her into the hospital and following that time she had periods of semi-consciousness.

Q. Other than her visit to you about the cold did you have occasion to doctor her or administer to her? A. That was the only time.

Q. How long was that before this accident?

A. That was about thirty days, approximately.

A. About thirty days before the accident that she called on you? A. Yes sir.

Q. Prior to that time you hadn't administered to her or examined her physically for any condition? A. No sir.

Q. Now, after that cold did you treat her at all before the accident? A. No sir.

Mr. Black: That's all.

Cross Examination

By Mr. Smith:

Q. You said that Mrs. Newby was brought to the hospital [180] September 11, 1942?

A. *You* sir.

Q. What time of day? A. In the evening.

(Testimony of Dr. R. B. Lindsey.)

Q. What time of the day was it?

A. As near as I can remember it was about a quarter to five.

Q. You helped Mike McGuire carry her out of the automobile and in to the hospital?

A. Yes sir.

Q. After you had placed her in the hospital did you make any examination of her?

A. Yes sir.

Q. Was this examination immediately or some time after? A. Immediately.

Q. Will you state briefly the extent of your examination?

A. I made a complete examination of the surface of the body to determine if there were any surface injuries; also an examination of her heart, lungs and a superficial examination of the abdomen to determine if there was a hemorrhage internally; also examined the scalp carefully to see if there was any sign of a fracture of the skull; also the pupillary reflex of the eyes. Just made a complete general physical examination at that time.

Q. Was she breathing? [181] A. Yes sir.

Q. Are you familiar with the odor of alcoholic liquor? A. Yes sir.

Q. I will ask you whether you detected any alcoholic odor on the breath of Mrs. Newby at that time? A. No sir.

Q. I will ask you if you remember at Montpelier, Idaho, on March 23, 1943, when you were

(Testimony of Dr. R. B. Lindsey.)

present, Mr. Merrill was present, and I was present and we had a conversation with you concerning this case? A. I remember you calling.

Q. Do you remember at that time we asked you that question, and do you remember your answer? Oh! yes, and Doctor Rich was also present.

A. I think your question was put differently at that time than it is now.

Q. Did you not at that time state that she had a strong alcoholic odor when admitted to the hospital,—before you answer that question, do you remember one other person was present?

Mr. Davis: Who was the other person?

Mr. Smith: Just a minute and I will give you the name.

Q. The nurse, Phoebe Tarbet was present at that time? [182]

A. No, I don't remember that she was present at the time of the conversation. Our conversation was finished and I called her from the hospital floor and from that time it was a conversation between you and Miss Tarbet.

Q. Relating to the conversation which we had in your office at which time you and Mr. Merrill and I were present and Doctor Rich stepped in sometime during the conversation, you remember that? A. Yes, I do.

Q. And the question that I put to you was asked at that time and you made the answer that I said you made.

(Testimony of Dr. R. B. Lindsey.)

A. I think I made the statement that there was an alcoholic odor.

Q. What is the fact?

A. May I ask a question?

Q. Can you answer that question?

A. Yes, I could but the questions have been contradictory and that is the reason I am hesitating to answer.

Q. What is the fact, and if you have any explanation you can then make your explanation.

A. The fact is that I suspected that there was alcoholic odor to her breath, from my experience.

Q. Was there?

A. I am not in a position to prove that, but that was my opinion.

Q. Do you entertain an opinion now? [183]

A. I said in my opinion there was an alcoholic odor to her breath.

Q. After you made the examination that you have testified to, when was the next time that you saw Mrs. Newby?

A. I saw her about thirty minutes after the examination was finished.

Q. Will you state if you know, whether or not the contents of the patient's stomach was removed, and if so, in what manner, shortly after she was admitted to the hospital?

A. She vomited the contents of the stomach.

Q. Did you examine the contents?

A. I observed it, but did no laboratory work on it.

(Testimony of Dr. R. B. Lindsey.)

Q. How long did that occurrence happen after she was admitted to the hospital?

A. About fifteen minutes, maybe twenty.

Q. Was she conscious, semi-conscious or unconscious at that time?

A. Unconscious at that time.

Q. From your examination of the contents of the stomach,—you examined it by observation did you not?

A. Yes sir.

Q. From your examination do you have an opinion as to whether there was an alcoholic content in the contents of the [184] stomach?

A. Yes sir.

Q. And by the sense of smell, did you not?

A. Yes, sir.

Q. Now, will you state that opinion?

A. Well, in my opinion from the examination of the contents of the stomach it would be my judgment there was the presence of alcohol in the contents.

Q. Now, the second day after she had been admitted to the hospital, or approximately two days later, did you,—rather, did Mrs. Newby make a statement or remark to you relating to her conduct at the time or just prior to the time of the accident?

A. No sir.

Mr. Davis: We object to this unless it is shown that she was conscious at the time she is supposed to have made the remark.

The Court: He may answer if he knows.

Mr. Smith: I think the Doctor had answered.

(Testimony of Dr. R. B. Lindsey.)

A. Yes, I said no.

The Court: We will recess until 1:30.

(Admonition to the jury.)

1:30 P.M. October 21, 1943

Q. Doctor, is it not a fact that approximately two days after Mrs. Newby had been admitted to your hospital that she told you that she was a fool for going out—— [185]

Mr. Davis: Now, we object to this being placed before the jury for the reason that the testimony shows that this patient remained in a semi-conscious condition several days after the accident and this could not have anything to do with anything that would be material here.

Mr. Smith: We intend to show that declarations were made against interest and within the purview of cross examination.

The Court: I think I will excuse the jury and hear you on this matter.

(In the absence of the jury.)

The Court: Now, you may finish stating your question.

Q. Is it not a fact that at that time she told you that she was a fool for going out and getting drunk?

The Court: I would like to have your position on this matter.

Mr. Smith: We are asking this upon the theory of declaration made against interest. The materiality is that it is in part based upon the doc-

(Testimony of Dr. R. B. Lindsey.)

trine of assumption of risk and contributory negligence.

The Court: What have you to say Mr. Davis?

Mr. Davis: He cannot introduce any declaration against interest without laying the [186] foundation. There is no showing here that she knew what she was doing at that time. The testimony is to the effect that during all this time she was in a semi conscious condition. Second, as to that being a charge of contributory negligence; it has developed now that the defendant Hair claims this accident was caused by his being forced off the road, and her actions could not have possibly in any way contributed to that. The cases are to the effect, or, there are cases to the effect that where a guest furnishes liquor to the driver of a car and gets the driver of a car drunk, some authorities hold that there is an assumption of risk. That is not the case here, and in this instance the evidence is offered for the purpose of injuring or attempting to injure this young woman's reputation, and I say they should not be allowed to make any such statement as this unless they can make some showing. They have not yet proved anything about her being intoxicated——

Mr. Merrill: ——Counsel overlooks the fact that we had had no opportunity to prove our case at all as yet. We don't claim that this is a part of the *res gestae* at all. The only thing is this, it is an admission by her *or* her condition and misconduct and it has a vital effect in this case.

Mr. Smith: Counsel made the statement that

(Testimony of Dr. R. B. Lindsey.)

it is developing in this case, or that [187] it is indicative at least that Hair ran off the road and his car became out of control. I am just wondering now if counsel is making an election on one of the two theories we attempted to force an election on in this case. One was the alleged acts of negligence on the part of the employers in hiring this man, it being alleged that he had a previous record in driving automobiles, and the second theory is the negligent acts in carrying gratuitous guests under the guest law. I am wondering at this time whether or not we can force them to make an election on their theories at this time, and we will renew *out* motion for election.

The Court: I think the Bailiff may call the jury.

(The following proceedings had in the presence of the Jury.)

The Court: The witness may answer the question.

Mr. Smith: I will ask the question again.

Q. Did Mrs. Newby, after she had been admitted to the hospital and been there approximately two days, *made* the statement to you that she had been a fool for going out and getting drunk?

A. No sir.

Q. What did she say in that regard?

A. Absolutely nothing. [188]

Q. She said nothing about that?

A. Absolutely nothing to me.

Q. Did you hear her say anything to anybody?

(Testimony of Dr. R. B. Lindsey.)

A. No sir.

Q. I am going to call your attention to an incident in March 1943, during the late afternoon at which was present myself, Mr. A. L. Merrill and we had a conversation with you concerning this case, do you remember the incident? A. I do.

Q. Do you remember that you told us that two days later after she had entered the hospital she told you that she was a fool for going out and getting drunk?

A. I did not make that statement.

Q. What statement did you make?

A. None in regard to that.

Q. You deny making any such statement?

A. Very definitely.

Q. Did she make any statement?

A. The only statement she made was to tell me what her name was immediately after entering the hospital.

Mr. Smith: That is all.

The Court: Just to make my ruling clear for the record, and the jury; the jury will disregard any question asked by counsel as being prejudicial in any way. [189]

Redirect Examination

By Mr. Coughlin:

Q. You testified earlier that you detected an alcoholic odor on Mrs. Newby, will you explain what you meant by that?

A. Well the only explanation I can make of that statement is that from the odor of the stomach

(Testimony of Dr. R. B. Lindsey.)

content and the breath, from my experience I would judge that there was an odor of alcohol present.

Q. Would that *meant* that she had drank intoxicating liquor?

Mr. Merrill: We object to that, it is very evident, and it is not a proper question, it invades the province of the jury.

The Court: Objection sustained.

Q. Will you explain further what you mean by an alcoholic odor? Does that necessarily mean that the odor would come from alcoholic beverages?

Mr. Smith: We object to the question as leading and improper redirect examination.

The Court: He may answer.

A. No sir.

Q. Do you mean to say Doctor that the odor did come from alcoholic beverage?

Mr. Smith. Objected to. The Doctor has fully answered that question.

The Court: He may answer. [190]

A. No sir.

Mr. Coughlin: That's all.

Recross Examination

By Mr. Smith:

Q. You say that you did detect the odor from the contents of the stomach? A. Yes sir.

Q. That would also indicate, in your opinion, that an alcoholic beverage had been drunk by the patient?

A. No, I would not make that statement.

(Testimony of Dr. R. B. Lindsey.)

Q. I asked for your opinion, what is that opinion?

A. I have no opinion in that regard.

Q. Did you give an opinion that it might mean there was alcoholic content in the stomach?

A. May I have that question please?

Q. I will ask the converse of that question. Would not that, in your opinion,—strike that,—Doctor, in your opinion might not the odor of alcohol from the contents of the stomach also mean that she had been drinking alcoholic beverages a short time before? A. It could.

Q. That is your opinion?

A. My opinion is that the alcoholic odor could be from an alcoholic beverage or from alcohol whether a beverage or not.

Mr. Smith: That is all. [191]

Redirect Examination

By Mr. Coughlin:

Q. Does that mean that a person would have to drink something to have an alcoholic odor?

Mr. Smith: Objected to as repetition and leading.

The Court: I think I will let him answer.

A. Yes, I would say it did.

Q. Are there other things that a person could drink besides alcoholic beverages that would cause an alcoholic odor?

Mr. Smith: Objected to, the Doctor has fully answered that question on direct, and recross.

(Testimony of Dr. R. B. Lindsey.)

The Court: Sustained.

Mr. Coughlin: That's all.

Mr. Smith: Yes, that is all.

GEORGE H. NEWBY

being called as a witness on the part of the plaintiffs after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Davis:

Q. State your name.

A. George H. Newby.

Q. How old are you? A. Thirty-five.

Q. Where do you live? [192]

A. Montpelier.

Q. What is your business?

A. I work for Morrison-Knudson Contractors.

Q. How long have you worked for them?

A. Since 1927.

Q. When were you married,—you are married?

A. Yes sir.

Q. When were you married?

A. May 18, 1930.

Q. To whom were you married?

A. Miss Avenell Tuescher.

Q. How many children did you have?

A. Two.

Q. What are their ages? A. Six and eight.

Q. And what are their names?

(Testimony of George H. Newby.)

A. Richard Arlen and Patty Ann.

Q. What were the expenses of the last illness of your wife?

A. Doctor and nurse \$115.00,—the hospital and funeral expense \$268.00 and Doctor's expense \$115.00.

Q. How old was Mrs. Newby in September 1942?

A. Twenty-eight.

Q. What size was Mrs. Newby?

A. She weighed a hundred and five pounds, approximately.

Q. What kind of a looking girl was she?

A. A very, very good looking woman. [193]

Q. What kind of a house-keeper was she?

A. Very good.

Q. What kind of care did she take of the children?

A. Very good.

Q. What kind of care did she take of you?

A. I wouldn't ask for better care.

Q. What kind of cook was she?

A. A very good cook.

Q. How did you feel toward your wife?

A. She was the one woman I should keep if I could.

Q. Did you love her?

A. I did.

Q. Did she return your affection?

A. She did.

Q. What kind of care was taken of the children?

A. Very good care.

Q. Since the death of Mrs. Newby have you

(Testimony of George H. Newby.)

been able to have your children with you or to provide a home for them? A. I have not.

Q. Where have the children been since then, and where are they now?

A. In the care of my wife's mother and they are still with her.

Q. Have you paid for that care?

A. Yes sir.

Q. How much have you paid? [194]

A. Seventy-five dollars a month.

Q. Where are they to continue to be kept?

A. With Mrs. Tuescher.

Q. That is your wife's mother?

A. Yes sir.

Q. Have you ever seen Mr. Donnelly?

A. Yes sir.

Q. When did you first see him?

A. Before noon on the Sunday following the accident.

Q. Where were you at the time of the accident?

A. Kemmer, Wyoming, working.

Q. When were you notified?

A. I was never notified. They knew I would be home Saturday night, that is the first time I knew about the accident.

Q. Where did *you* Mr. Donnelly at this time that you say you saw him?

A. I was returning to my brother-in-law's from the hospital. Just before you get there there is a Shell station and that is where I met him.

Q. Had you ever met him before?

(Testimony of George H. Newby.)

A. Previous to this my brother-in-law had met him and at this time we were walking to his home and we met Mr. Donnelly and he introduced himself to me.

Q. What did he say?

A. He introduced himself to me. He said, "I am Mr. Donnelly, [195] I am the manager of the Reynolds Tobacco Company for this District and I have come up to see about the wrecked car."

Q. Was anything said about your wife?

A. He asked how my wife was and I said she was very, very ill, and he asked if I had a good competent Doctor, and I said that I thought I had and he said "would you let me go and talk to the Doctor" and I said yes, or he seemed to be under the impression that I said yes, and he went and talked to the Doctor.

Mr. Merrill: We object to that as being a conclusion of the witness.

Q. Did he leave?

A. He left and talked to the Doctor.

Q. Were you there when he talked to the Doctor?
A. I was not.

Q. Did he come back and say that he had talked to the Doctor, after that?

A. I met him as he came out ahead of the Doctor.

Q. Did he say anything to you?

A. Yes sir.

Q. What did he say to you?

(Testimony of George H. Newby.)

A. He said "I think you have a very competent doctor".

Q. Was any statement made concerning Mr. Hair?
A. Yes sir, there was.

Q. State what that was. [196]

A. Mr. Donnelly told me in the course of the conversation that he had got Mr. Hair out of these scrapes before and that there would be no reason to bring suit against Hair; there would be no chance to get anything against him, and he said "we are fully protected" and there was no use to bring suit.

Q. Was anything said about getting excited?

A. Yes sir, he told me not to get excited; that he had talked to Mr. Hair and he said as far as he could tell it was just an innocent ride, and for me not to get excited, that he thought everything would be all right.

Mr. Davis: That is all Mr. Newby.

Cross Examination

By Mr. Merrill:

Q. Mr. Newby were you at your home on the 10th day of September 1942?
A. I was not.

Q. Or the evening of the 10th of September 1942?
A. I was not.

Q. That was the night before the accident?

A. Yes sir.

Q. Where did your children stay that night?

A. I don't know.

Q. Did you make any inquiry?

(Testimony of George H. Newby.)

A. I did not.

Q. You knew that your wife had been away all night? [197]

A. I didn't know it at that time.

Q. You know it now?

A. I do not know it now.

Q. You made no inquiry as to when she left home?

A. No, sir.

Q. Or as to where the children had stayed that night?

A. No, sir.

Q. Why didn't you?

A. I figured that they were with their mother. I didn't see any reason for any inquiry.

Q. Didn't you make any inquiry as to why she was out with Mr. Hair?

A. If she was out with him she did it under her own volition.

Q. You thought she had a right to go out with him and to be out all night?

A. I don't know she was.

Q. Do you think it would be proper for her to be out with him all night?

A. I do not.

Q. Why didn't you make inquiry as to how long she had been with him and where she had been?

A. She was too sick to ask her.

Q. I didn't mean for you to ask her. Did you make any inquiry as to where she had been when you learned that she had been injured on the highway between Soda Springs and Montpelier? [198]

A. Certainly I asked.

Q. What did you learn?

(Testimony of George H. Newby.)

A. I didn't learn anything.

Q. Who did you ask?

A. My brother-in-law.

Q. He didn't know? A. He didn't know.

Q. Did you ask anyone else? A. No, sir.

Q. Didn't make any further inquiry?

A. No, sir.

Q. Never tried to find out why she went with Hair? A. No.

Q. Never tried to find out when she went with him? A. No, sir.

Q. Never tried to find out how long she had been gone? A. No, sir.

Q. That was her own affair? A. Yes, sir.

Q. If she wanted to run out like that, she could do so?

A. No, I wouldn't think that would be right if she did.

Q. What did you mean when you said you thought it was her own affair?

A. I wasn't there to say she couldn't.

Q. How long had you been away?

A. I left the apartment at three o'clock Monday morning.

Q. The Monday before the accident? [199]

A. Yes, sir.

Q. The accident was on Friday afternoon?

A. Yes, sir.

Q. How much of the time had you been away during the Summer, would you say half of the time?

A. About one-third of the time.

(Testimony of George H. Newby.)

Q. Where had you been?

A. I lived in Tennessee, she was with me then, and I returned to Montpelier, Idaho, in the latter part of July, and from there to Echo, and she went over to visit her brother and she returned to Geneva a week from that date.

Q. When was that date?

A. I wouldn't know for sure.

Q. When did you establish residence in Montpelier?

A. Twenty-eight days before this accident.

Q. Where did you have your residence?

A. The Downing apartments.

Q. Who operates those apartments?

A. They belong to Mr. Downing and the first name of the man running them is Jack.

Q. Did he ever talk to you about your wife residing there?

A. No he never did. I met him only once when I paid the rent to him.

Q. Where were the children when you returned?

A. With my brother-in-law and his wife.

Q. Did you ask how long they had been with them? [200]

A. They had been with them from the night before.

Q. The night before?

A. This was on Saturday and they had been with them since Friday evening.

Q. When did you come home?

A. Saturday evening at four o'clock.

(Testimony of George H. Newby.)

Q. Where did you find the children?

A. At Russel Tuesher's.

Q. How long had they been with them?

A. From the Friday before I got home. The day before I got home.

Q. What time Friday did they go there?

A. I don't know.

Q. You never asked?

A. No. We only lived a few blocks away and they are there quite a lot of the time.

Q. You don't know where they were Thursday night?

A. No, sir.

Q. Nor Friday morning?

A. Yes, I think they were at Russell's Friday morning.

Q. But you never made inquiry who took care of them the night of the 10th or the morning of the 11th?

A. No, sir.

Q. Never made inquiry as to when your wife left them there?

A. No, sir. [201]

Q. Now, you said that Mr. Donnelly told you not to get excited.

A. That's right.

Q. He told you that in response to your threat to kill Mr. Hair?

A. I don't remember that I made that threat.

Q. Didn't you tell Mr. Donnelly if your wife died that you would kill Hair?

A. No, I don't remember making that statement.

Q. And that is when he told you not to get excited?

A. I don't remember making that statement.

(Testimony of George H. Newby.)

Q. Then why did he tell you not to get excited?

A. I was nervous and upset at the bad illness of my wife.

Q. Was that before he had been to the hospital of after? A. Before.

Q. That was the entire conversation that you have purported to relate? A. No, sir.

Q. Did you have two conversations?

A. Yes, sir.

Q. Where was the conversation in which you have related certain statements as having been made?

A. That was before,—now, let's see, which statement do you mean?

Q. The ones you stated into the record.

A. That could have been at both, some of it at both times.

Q. Where did he tell you not to get excited? [202]

A. At the service station.

Q. Who was present?

A. Russell Tuesher, Mr. Donnelly, Mr. Hair and myself.

Q. Who was present when Mr. Donnelly said in substance and effect that he had gotten Hair out of scrapes before?

A. Russell Tuesher and myself.

Q. When was that? A. In the afternoon.

Q. Where did it occur?

A. At the Police station.

Q. Why were you there?

(Testimony of George H. Newby.)

A. They had come to try and get Hair released so he could go home.

Q. What was the conversation after you had told Mr. Donnelly to go to the Doctor and he had gone to the Doctor?

A. He said "I think you have a very competent Doctor" and I said "Did the Doctor tell you there was any possible chance for her to recover" and he said "very much so".

Q. That was all of that conversation?

A. Yes, sir.

Q. Did you talk to him later? A. Yes, sir.

Q. Where? A. At the police station.

Q. And that was the third conversation?

A. Yes, sir. [203]

Q. Was it at that conversation that Mr. Donnelly made the remark that you have testified to?

A. What remark do you refer to?

Q. That was at the service station.

A. Which conversation?

Q. About Hair being in scrapes before?

A. Mr. Donnelly was at the police station.

Q. Who was present?

A. Donnelly, Hair, Mrs. Hair, Russel Tuesher and myself, that's all I remember.

Q. Was that at the time all those were present?

A. Yes, sir.

Q. That you had the conversation in which he said that Hair had been in scrapes before and he had gotten him out? A. That's right.

(Testimony of George H. Newby.)

Q. And there was no use of suing?

A. Yes, sir.

Q. That was in the presence of these people?

Q. We were off by ourselves.

Q. Mr. Hair was there? A. Mrs. Hair.

Q. Didn't you say that Hair was there?

A. I did not.

Q. Mr. Donnelly was there?

A. Mrs. Hair, myself, Russell Tuesher, Mr. Donnelly, the Chief of Police and Mr. Bunderson. [204]

Q. It was there,—withdraw that—they were all in the room? A. Yes, sir.

Q. It is a small room? A. Not small.

Q. They were all there together?

A. Yes, sir.

Q. Was anyone else talking when you were talking to Mr. Donnelly? A. No.

Q. So you have no reason to think the rest of them couldn't hear your statement?

A. We were talking low.

Q. There was no reason to think *they* they couldn't hear your statement?

A. No, I don't suppose there would be.

Q. They may have heard it, if it was made.

A. They may have.

Mr. Merrill: That is all.

Cross Examination

By Mr. Black:

Q. You and your wife have been living together all the time since your marriage?

A. Yes, we have.

(Testimony of George H. Newby.)

Q. Had you separated on the basis that you were not going to live together any more?

A. No, sir. [205]

Mr. Black: That is all the questions, I have. No, if I may I believe I will ask a couple more.

The Court: Go ahead.

Q. Prior to living at Montpelier where did you live? A. Indiana.

Q. For how long? A. Five years.

Q. What town? A. Linton.

Q. Just before you came to Montpelier?

A. No.

Q. Just previous to coming to Montpelier where had you been living? A. Bristol, Tennessee.

Q. How long had you lived there?

A. Went there in February and left there in July.

Q. In 1942? A. That's right.

Q. Prior to that where did you live?

A. Anderson Ranch Dam, Boise, Idaho.

Q. How long did you live there?

A. We went there in October and left there in February.

Q. Your wife live there with you?

A. Yes, sir. [206]

Q. You had established a temporary residence at Montpelier.

A. We established a residence there for the children to go to school there.

Q. Had you resided in Montpelier before that time?

(Testimony of George H. Newby.)

A. Yes, sir, I was married in Montpelier.

Mr. Black: That is all.

Redirect Examination

By Mr. Davis:

Q. Mr. Davis: May I ask a question that should have been asked on direct examination?

The Court: Yes, you may.

Q. How old is Richard? A. Ten.

Q. How old is Patty? A. Eight.

Mr. Davis: That is all.

Mr. Merrill: Nothing more.

Mr. Black: That is all.

ROSETTA TUESHER,

being called as a witness on the part of the plaintiff,
after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Davis:

Q. State your name please?

A. Rosetta Tuesher.

Q. Where do you live? [207]

A. Geneva.

Q. How many children have you?

A. Eight.

Q. Mr. Merrill: Objected to as immaterial.

The Court: She has answered and the answer may stand.

Q. Did you have a daughter Avenell?

(Testimony of Rosetta Tuesher.)

A. Yes, sir.

Q. Was she the wife of Mr. Newby who just testified? A. Yes, sir.

Q. How old was Avenell at the time she passed away?

A. She passed away on the 16th of September and she was eighteen in the August before that.

Q. Eighteen?

A. Twenty-eight is what I meant to say.

Q. How many children did she have?

A. Two.

Q. Where are they now? A. With me.

Q. Do you get paid for caring for them?

A. Yes, sir, seventy-five dollars a month.

Q. Who pays you?

A. Mr. Newby and he comes and stays with them when he can, too.

Q. Did you have occasion to visit Avenell's home at different times after she was married? [208]

A. I visited her at different times whenever it was close enough to go.

Q. What kind of a house-keeper was she?

A. A fine house-keeper.

Q. What kind of care did she take of the children? A. Fine.

Q. When the children came to you what was their demeanor or behavior?

A. They were fine children.

Q. With reference to the exhibit now being shown you by the Bailiff, what is that?

A. It is my daughter.

(Testimony of Rosetta Tuesher.)

Q. Is that a good likeness of her?

A. Yes, sir.

Q. Is that a good likeness of her at the time just previous to the time she passed away?

A. She was a little older than when this was taken.

Q. Did she still look like that?

A. Yes, sir.

Mr. Davis: We offer this exhibit in evidence.

Mr. Merrill: We object to it upon the ground that it is immaterial and does not tend to prove any issue in this case. It is designed to prejudice the jury and no foundation is laid for its admission.

[209]

The Court: I cannot see that it is very material, however, I will let it in.

Mr. Davis: Now, Mr. Bailiff, will you hand it to the jury.

Mr. Merrill: I would like the record to show that we object to its being shown to the jury.

Q. Where did your daughter go to school?

A. Geneva to the eighth grade and to Montpelier to high school, Mr. Winter was the Superintendent.

Q. I thought you told me that she went to a seminary.

A. Yes she goes to a seminary in connection with the high school, there is a few *point* in addition they get.

Mr. Davis: That is all Mrs. Tuesher.

Mr. Black: No questions.

Mr. Merrill: No questions.

L. R. DONNELLY,

being called on cross examination under the statute, by the plaintiff, after being first duly sworn, testifies as follows:

Cross Examination

By Mr. Davis:

Q. State your name?

A. L. R. Donnelly.

Q. Where do you reside? [210]

A. Salt Lake City, Utah.

Q. By whom are you employed?

A. R. J. Reynolds Tobacco Company.

Q. How long have you been employed by them?

A. Approximately fourteen years.

Q. What is your position with the Company?

A. Division manager of the Salt Lake City Division.

Q. Is part of the Idaho territory in your division? A. Yes, sir.

Q. Did Mr. Hair work under you?

A. Yes, sir, he did.

Q. For how long?

A. He started to work, if I recall, in 1937.

Q. What counties or towns in Idaho were in his territory?

A. His headquarters was Pocatello, his territory extended north to the Montana line, extended west almost to American Falls, a little this side, and south to the Utah line and it extended east to the Wyoming line.

Q. That was true of all of the time he worked for you?

(Testimony of L. R. Donnelly.)

A. No, he started in Salt Lake City. At one time his territory was in Salt Lake City, Utah.

Q. But all of the time he was in Idaho he had the territory you have referred to?

A. Yes, sir.

Q. Bear Lake County was in his territory? [211]

A. Yes, sir.

Q. Clark County was in his territory?

A. Yes, sir.

Q. The town of Dubois? A. Yes, sir.

Q. Did you have occasion to come to Pocatello on or about April 15, 1939?

A. I think I came to Pocatello on April 17th.

Q. What was your purpose in *come* here?

Mr. Merrill: I object to that as immaterial, incompetent and irrelevant for any reason, having nothing to do with this accident. Nothing at all to do with the controversy involved in this case.

The Court: Does counsel intend to connect this up?

Mr. Davis: Yes, your Honor.

The Court: If it is not connected up I will strike it later.

Mr. Merrill: Now, we furthermore want to find out what his idea is in connecting this up. If it is for the purpose of attempting to prove any allegation in paragraph seven we ask to be heard on the legal aspect of that.

The Court: Is that the purpose?

Mr. Davis: That is the purpose. [212]

(Testimony of L. R. Donnelly.)

The Court: I will excuse the jury for a few minutes.

(Jury excused.)

The Court: I take it that the question is propounded under the last part of paragraph seven of the complaint, "notwithstanding that at all of said times the said Tobacco Company and Donnelly knew that Rulon D. Hair was a careless, reckless and incompetent driver of an automobile and was in the habit of hauling guests contrary to instruction."

Mr. Davis: Yes, your Honor.

The Court: And that is what your objection goes to.

Mr. Merrill: Yes, that allegation is just innuendo. There isn't an allegation in the whole complaint that Hair was an habitual, reckless and careless driver. They take these words from the case of Department of Water and Power v. Anderson 95 Fed. (2) page 577, and if your Honor cares to examine that case you will find that before the words "who were directly over him" and following the words "said employers" there are stars indicating a considerable portion has been left out.

The Court: How would the employer receive notice except through the manager. It is conceded here that Mr. Donnelly is the manager, the district manager of the Reynolds Tobacco Company. Of course, the question we have presented here is not now so much a matter of evidence but pleadings, it is an attack on the pleadings. [213]

(Testimony of L. R. Donnelly.)

Mr. Merrill: And of course, the showing must conform to the law.

The Court: I take it that your objection here is in the way of a rather technical objection because the complaint does not allege what you claim that it does not allege. However, the liberality with which the pleadings are considered under the rules, take the allegation: Notwithstanding that at all of said times the said tobacco company and Donnelly knew that Rulon D. Hair was a careless, reckless and incompetent driver of an automobile and was in the habit of hauling guests contrary to instruction. I can see that the complaint may have been better if they had also alleged that he was reckless, however, I don't think anybody could be misled.

Under the case read or referred to by Mr. Merrill these were questions which were taken care of by instructions to the jury. We don't know how far the *plaintiff* are going, what they are going to do here.

Mr. Smith: Isn't it true that Your Honor should force the plaintiffs to make the showing which they have started out to make. We want to know if their showing is going to extend to this one accident, if they have two, or if they have more. If [214] they didn't have more than one or two then their showing cannot stand in face of the rulings of the Federal Courts. In other words, it would be an error for Your Honor to allow that

(Testimony of L. R. Donnelly.)

showing in the face of the Federal cases we have.

The Court: At this time it is impossible to tell how far the evidence will go. The objection is overruled at this time. However, I will say that there is one serious question in the Court's mind. When you get outside of the facts themselves, whether the Court record would be admissible. Before that Court record is introduced I would like to hear from counsel. I don't mean that the acts of negligence would not be admissible, but the question of the conviction, whether just the Court record of the conviction would be admissible. However the acts of negligence and the driving recklessly I don't think there would be any question about that, I am just a little in doubt about the admissibility of the Court record. Have you any authority on that.

Mr. Davis: The rules say that the way to prove a record is by copies. If a man is charged and if a conviction is in the Court record, certainly that would be the highest proof you could have on that. [215]

The Court: The objection will be overruled, except as to this one question which I suggested and I will rule later on that. I think it would have to be submitted to the jury under proper instructions, or taken away later. However, I cannot take matters from the jury merely on supposition.

Mr. Merrill: At this time we would like to reserve the right to make a motion to strike the show-

(Testimony of L. R. Donnelly.)

ing that he has indicated that he is going to make, and take an exception to the ruling of the Court.

The Court: I will ask you to get along with *you* testimony up to the record of conviction.

Mr. Davis: I will not make an offer at this time.

The Court: Then you may make your motion to strike later.

Mr. Black: I would like exceptions to your rulings for my client.

The Court: Yes, that is understood.

Mr. Merrill: And of course, to our clients, we would like exceptions.

The Court: Yes, it is so understood to your clients also.

(Jury called and Mr. Donnelly recalled.)

[216]

Q. Mr. Donnelly do you recall the last question?

A. Yes, I understand the question, but *is* has been so long ago, it is rather vague. I came to Pocatello quite often. I think I came to investigate an accident.

Q. An accident by whom? A. Mr. Hair.

Q. An accident in which the Company truck was involved? A. That's right.

Q. Did you find there had been an accident in which that truck was involved? A. Yes sir.

Q. Did you find that a person had been killed in that accident?

(Testimony of L. R. Donnelly.)

Mr. Merrill: We object; that fact if it is a fact, there are other witnesses who know of it and it can be proved in the regular way.

The Court: He may answer.

A. Yes sir, I found out that there had been a person killed.

Q. Did you find out what time of day that accident happened?

Mr. Merrill: Objected to as leading.

The Court: He may answer.

Mr. Black: May it be understood that we join in all these objections without repeating it each time?

The Court: Yes. [217]

A. There is not doubt but that I found out the time of day it was, but it has been so long, and due to the length of time since that I don't remember.

Q. You found out it was not at a time he was engaged in Company business? A. Yes sir.

Q. Previous to this time you had instructed Mr. Hair not to haul guests in the truck?

A. Yes sir.

Q. You had instructed him not to use the car except on Company business? A. Yes sir.

Q. You found he had hauled a guest contrary to the Company instruction? A. Yes sir.

Q. And you found out that he was using the car not on company business?

A. That is correct.

(Testimony of L. R. Donnelly.)

Q. Did you go to the police station to *may* any investigation about this?

A. Yes sir, I made a thorough investigation of the accident.

Q. You made a written report to your Company? A. Yes sir.

Q. You have read the deposition or a copy of the deposition of the General Sales Manager and Director Mr. Darr? A. I have [218]

Q. You have seen in there a copy of a letter you wrote? A. Yes sir.

Q. Mr. Donnelly, you were present at the time of the trial at the time Mr. Hair was prosecuted for the death of the person in that accident?

A. I was present part of the time.

Q. Part of the time during the trial?

A. During the trial, part of it, yes.

Q. You heard the testimony of the witnesses?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial and improper cross examination under the rules.

The Court: Overruled.

A. I naturally heard the testimony.

Q. You heard Mr. Smullen the policeman testify? A. Yes sir.

Q. You heard him testify that Mr. Eckersley was in the car with Mr. Hair?

A. Before I answer that I would like to make an explanation.

The Court: You may explain.

A. When I found that Mr. Hair had hauled a

(Testimony of L. R. Donnelly.)

passenger naturally I investigated the accident, and what I found out was that Mr. Hair had taken his wife and child and neighbor to the train, the early morning train, which necessitated him having a car, and that wasn't during work hour, the accident took place when he was returning. [219]

Q. It was necessary to make that explanation in order to say whether Mr. Eckersly was in the car with Mr. Hair or not?

A. I want to explain.

Q. Well, you found Mr. Eckersly was in the car at the time he hit Mr. Myers?

A. Yes sir.

Q. There were two different times he had a guest in the car? A. No sir.

Q. His wife was with him? A. Yes sir.

Q. But his wife was not with him at the time of the accident?

A. No, but I think Mr. Eckersly was.

Q. And did you hear that same evening that Mr. Hare had the Company truck at the El Rio and at different places around town?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial.

The Court: Overruled.

A. I didn't hear that he used the car other than as I explained.

Q. You didn't hear that in the trial?

A. No sir, I don't recall hearing that at the trial.

Q. You don't remember hearing it?

(Testimony of L. R. Donnelly.)

A. No sir.

Q. You recall that you and the R. J. Reynolds Tobacco Company were sued by reason of that accident, in the District Court? [220]

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial.

The Court: Overruled.

A. Yes sir.

Q. You continued to permit Mr. Hair to work on your recommendation after you knew that he had violated the instructions both as to hauling guests and to using the car, or truck?

A. May I explain that?

Q. You continued to permit Mr. Hair to work on your recommendation after you knew that he had violated the instructions both as to hauling guests and using the car when not on company business?

The Court: You can answer that without any explanation, whether you did or did not.

Q. You recommended that he be allowed to continue? A. Yes sir.

Q. I am calling your attention to the deposition of E. A. Darr taken on behalf of the defendants which I asked you if you had read, now will you please look at that, and calling your attention to page 32 of the deposition is that a copy of the first report you made to the company after you came to Pocatello, at the time of this accident?

Mr. Merrill: That is objected to as incompetent, irrelevant and immaterial, counsel is asking him to

(Testimony of L. R. Donnelly.)

refer to an exhibit not in evidence and [221] it purports to be a part of a deposition not offered and until it is offered and considered by the Court it would be highly improper for the witness to be interrogated in reference to it. It is a deposition of another witness, and not of this witness.

The Court: He may answer.

Mr. Black: May I dictate an objection to this line of testimony.

The Court: Yes, you may do so.

General Black: Defendant Hair objects to this line of testimony and the introduction of any evidence as to the incident that is referred to for the following reasons: That there is no allegation in the complaint sufficient upon which such evidence could be admissible as against this defendant, and Second; that the evidence sought to be elicited is evidence of a separate and distinct transaction and could not in any way be connected with and is no part of the act in question in any sense; no part of the act with which this defendant is charged in this case at bar. That if the evidence regarding the incident were allowed to be introduced it would be only partly introduced, and there would only be a smattering of conclusions and statements without the entire record being presented to the Court; and therefore it would permit an inference to be drawn therefrom which would not be proper as to [222] this defendant's liability in this case. It would be prejudicial and could not effect the question of whether or not under this charge, this

(Testimony of L. R. Donnelly.)

defendant did recklessly or otherwise as charged, drive the car in this particular case; and this defendant should not be prejudiced by such evidence, which would be incompetent if he were being tried alone, by reason of the fact that there happens to be other defendants in this case.

Mr. Merrill: We adopt that objection and add that the same is not sufficient at law, and one incident is not sufficient to prove the allegation in paragraph 7.

The Court: The evidence will be admitted. The evidence introduced in regard to the knowledge of the Reynolds Tobacco Company and Donnelly is a matter that should not be considered by the jury as against the defendant Hair. It is admitted for the purpose of showing knowledge of the Reynolds Tobacco Company and Donnelly.

Mr. Merrill: May we have an exception?

The Court: Exception granted.

A. This is a copy that I made and sent to the Company but I cannot tell whether it is the first copy or not.

Q. This is the report you made to the Company?
A. Yes sir. [223]

Q. Turn to the next instrument and tell me if you know what that is.

A. Part of the same letter.

Q. The next letter or copy, do you know what it is?

A. From reading it I can tell you what it is, but I never saw it before.

(Testimony of L. R. Donnelly.)

Q. You never saw it before? A. No sir.

Q. You don't know what it is?

A. No, I don't know what it is.

Q. Showing you there, Mr. Donnelly, a letter in the deposition, whose signature appears on that?

A. My own signature.

Mr. Merrill: We object to that on the ground that there appears no signature, and it is incompetent, irrelevant and immaterial.

The Court: Objection overruled. He may answer.

A. It is a photostatic copy of my signature.

Q. That is your signature? A. Yes sir.

Q. What is that signature attached to? Is that a report you made to the Company?

A. It is a report to my company.

Q. Now, Mr. Donnelly, calling your attention,—turn on now to those two photostatic copies of the reports. Do [224] you know in whose hand writing that is in? A. No, I cannot say.

Q. You know Mr. Hair's signature?

A. I cannot see any signature.

Q. Turn to the next page. A. I have it.

Q. Do you know Hair's signature?

A. Yes sir, it is Hair's signature.

Q. Now turn and see if there is another one signed by Mr. Hair. A. That is right.

Q. Both of those you mailed to the Company and inclosed them with the letter that is yours?

A. No sir.

(Testimony of L. R. Donnelly.)

Q. You didn't send them to your Company?

A. I didn't mail them.

Q. Did you see Mr. Hair make them out?

A. I saw him make one copy.

Q. You looked it over when he made them out?

A. I looked it over I guess.

Q. Where did you see him make it out?

Mr. Merrill: Objected to on the same grounds.

The Court: The same ruling.

A. In the Chief of Police' office at Montpelier, Idaho as I recall it. [225]

Q. You knew, Mr. Donnelly, after you attended the trial, that Mr. Hair was convicted, did you not?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial, and not the best evidence. On the further ground that it is prejudicial and not within the pleadings.

The Court: That objection is sustained.

Q. Mr. Donnelly, you knew what he was being tried for, did you not?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial and prejudicial and not the best evidence.

The Court: He may answer.

A. Well, to tell the truth I was confused as to what he was being tried for.

Q. Did that report show he was arrested and out on bond?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial.

Mr. Davis: I will withdraw the question, if

(Testimony of L. R. Donnelly.)

there is any question the reports show for themselves.

The Court: Very well, then the Court will not have to rule on that objection.

Mr. Davis: We offer in evidence plaintiff's exhibit being heretofore identified as bearing Mr. Donnelly's signature. [226]

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial, and does not tend to prove or disprove any issue in this case.

The Court: It may be admitted.

Mr. Davis: Now, we offer in evidence exhibit 12 being two pages and being a photostatic copy of the report signed by R. D. Hair.

Mr. Merrill: We object on the same grounds.

The Court: It may be admitted.

Mr. Davis: We now offer in evidence exhibit 13 which has been marked for identification and marked a corrected report, and it is also signed by R. D. Hair, and has been identified by Mr. Donnelly.

Mr. Merrill: The same objection as made to the previous exhibits 11 and 12.

The Court: It may also be admitted.

Mr. Davis: I believe that is all of this witness.

Redirect Examination

By Mr. Merrill:

Q. You testified that you re-employed or employed Mr. Hair, or permitted him to continue in your employment after the accident in April 1939.

A. Yes sir, that is correct.

(Testimony of L. R. Donnelly.)

Q. And at that time you asked permission to explain that [227] answer, now, will you explain why and under what circumstances you permitted his continuance in the employ of that company?

A. While making the investigation I went and called on the police and also called on some of the dealers, asking their attitude toward Mr. Hair. I also attended the trial. It was very apparent to me that what happened to Mr. Hair on that fatal morning could have happened to anyone in the Court room here; also the fact that the jury recommended leniency for Mr. Hair, that is what I based my opinion on.

Q. Was there any instructions given to Mr. Hair in respect to that?

A. Yes sir, very emphatic.

Q. What were they?

A. We have a car agreement that Mr. Hair signed. Before an employee is allowed to operate a car, or an employee is hired he is gone into very thoroughly, as to whether he is competent to drive.

Q. What did you find with respect to Hair?

A. I found that he was a competent driver.

Q. Continue.

A. After he signed this car agreement, I explained it in detail, and after the accident I sat him down in the hotel room, and also my superior officer was with me at that time, and I explained to him and his wife that [228] there would be no more passengers in that car, and if it ever was found out that

(Testimony of L. R. Donnelly.)

he carried another passenger he would be discharged immediately.

Q. And did you advise him of that if he carried passengers again he would be discharged immediately? A. Yes, sir.

Q. And did he sign the agreement of the character you mentioned when he took the car of his employer? A. He did.

Q. I hand you defendant's exhibit 14 and ask you what it is?

A. That is the car agreement signed by R. D. Hair and given to him by myself, the property of the company.

Q. What is the date of this?

A. The 8th of February 1942.

Q. Does that have reference to the car involved in that accident and in this case, the Chevrolet panel truck?

A. I believe this car was given to Mr. Hair after his accident.

Q. Does that have to do with the car involved in the accident near Montpelier?

A. Yes, it does.

Q. Did Mr. Hair sign that? A. He did.

Q. In your presence? A. Yes, sir. [229]

Q. It was pursuant to that agreement that the car he was driving at the time of the Montpelier accident was received by him?

A. Yes, sir, that is correct.

Mr. Merrill: We offer in evidence defendant's exhibit 14.

(Testimony of L. R. Donnelly.)

Mr. Davis: No objection.

The Court: Admitted.

Mr. Merrill: I would like to read it at this time.

The Court: Yes, you may read it.

Mr. Merrill: "Salesman's agreement to whom car is delivered. R. J. Reynolds Tobacco Company, Winston-Salem, N. C. This will certify that there was delivered to me this 8 day of February 1942, at Salt Lake City Utah, one Sedan Delivery Chevrolet 6 1941 Model A. A. Sedan delivery, motor number A A 517606, Silver tag number 9020, with the regular and special equipment, as fully explained in your letter of instructions which I have carefully noted, and which I do hereby agree to observe in operating car, and same will be followed to the best of my ability in making my services of more value as a salesman, while the car is in my charge. I further agree that I will be responsible for the car, its parts and equipment, and upon request will turn same over to you, your successor, or a duly authorized representative [230] of R. J. Reynolds Tobacco Company. I further agree that I will not use the car for any other purpose than that of furthering R. J. Reynolds Tobacco Company's business as directed by my Division Manager. I understand that under no consideration am I to permit anyone save and except an employee of R. J. Reynolds Tobacco Company to ride with me in the said car. R. D. Hair Witness L. R. Donnelly." Under Mr. Hair's signature are the words, Salesman sign here, and under Mr. Donnelly's, Division Manager's signature.

(Testimony of L. R. Donnelly.)

Q. Now, Mr. Donnelly, was there any violation of any kind or character on the part of Mr. Hair of the rule against carrying guests, that ever came to your knowledge, if any ever occurred, from the time that you advised him in the hotel that he could continue in your employment, up until the time of the accident of September 11, 1942?

A. No, sir, no occasion and no time that I knew of anything like that, no time that I knew of when he carried any passengers.

Q. During that period of time what was his record as a driver?

A. Very good. The Company had sent him letters every year, stating that he had no accidents and sent him an emblem every year.

Q. Did he have any accident of any kind or character between [231] the one in 1939 near, or in Pocatello, and the one near Montpelier in September 1942?

A. None, no sir.

Q. Did any information of any kind or character ever come to you that he had hauled any guest in his car?

A. The only one I knew of was that one when I said that he carried a passenger.

Q. That was in Pocatello in 1939, that was the time that you considered discharging him?

A. Yes, sir.

Q. And it was after that that you had the conversation and made it plain to him that he would be discharged if he ever hauled a guest again?

A. That is correct.

(Testimony of L. R. Donnelly.)

Q. What was done when you found that he had Avenell Newby in the car as his guest?

A. He was discharged.

Q. When was he discharged?

A. The 12th of September, the moment I got there.

Q. Is he in your employ now?

A. He is not.

Q. Has he been since the 12th of September 1942?

A. He has not been.

Mr. Merrill: That is all.

Recross Examination

By Mr. Davis: [232]

Q. Mr. Donnelly, you just made a statement that he had no accident or trouble of any kind or character during this certain time, do you mean to say that he didn't have or that you didn't know it?

A. I didn't know of any accident to the car and naturally I would have, he turned in all the expenses, and he turns in the expenses to the car.

Q. He makes a report, and if he was convicted of reckless driving and had a guest in the car, you would have known that? A. Not necessarily.

Q. Now, that exhibit that you delivered to him in February 1942. You had delivered exactly the same thing when you delivered the car that he had in the accident in Pocatello? A. Yes, sir.

Q. And he had already signed the same statement before? A. Yes, sir.

Q. You said that you didn't know the outcome of the trial.

(Testimony of L. R. Donnelly.)

A. If I said that I didn't mean to say it.

Q. You told counsel that the jury recommended leniency.

Mr. Merrill: He has not so testified.

The Court: I think he testified to that in answer to your question. [233]

Q. They had convicted him when *the* recommended leniency had they not?

Mr. Merrill: Objected to as calling for a conclusion.

The Court: The objection is sustained to this question.

Q. After he had violated the instructions that you had given him and that you have introduced here, you went together with one of the officers of the Company, and took Mr. Hair to the hotel and had a good talk with him?

A. Yes, sir.

Q. Was he a good salesman?

A. Very good.

Q. And you wanted to keep him on for that reason?

A. Not wholly.

Q. Did you have any suspicion that if he violated the instructions once that he might violate them again.

A. I naturally didn't think so or I wouldn't hire him back.

Q. You naturally didn't think he would violate them in the first place or you wouldn't have hired him then would you?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial and argumentative.

(Testimony of L. R. Donnelly.)

The Court: He may answer.

A. No, sir. [234]

Q. What made you think after he violated them once, and you and the officer of the Company had this heart to heart talk with him, what made you think that and having him sign this exhibit 14 would be more impressive than the first one was?

Mr. Merrill: We object to that question, it was not at that time that he signed this exhibit 14.

The Court: He may answer as to what the fact is.

A. I believed under the circumstances after investigating the accident that Mr. Hair was not trying to violate the rules, although he did violate a company rule by taking his wife to the train, but he didn't have any transportation to take her to the train that morning.

Q. And that is your answer to the last question?

A. That is my answer.

Q. He had a good record as a driver after this time that Mr. Myers was killed?

A. That is true.

Q. Did he have a good record in Clark County as a driver?

A. I imagine all over the territory.

Q. That was in his territory? A. Yes, sir.

Q. And under your supervision?

A. Yes, sir. [235]

Q. Did he have a record of having guests in his car? A. Not that I know of.

Q. Did you try to keep advised?

A. Yes, sir.

(Testimony of L. R. Donnelly.)

Q. After you put him back in your employ, did you take steps to ascertain if he was obeying your instructions? A. Yes, sir.

Q. You tried to keep advised about it?

A. Yes, sir.

Mr. Davis: That is all.

Mr. Merrill: Nothing further.

Mr. Black: No questions.

SID CLOSE,

being called as a witness on the part of the plaintiff,
after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Davis:

Q. Will you state your name?

A. Sid Close.

Q. Where do you live? A. Dubois.

Q. Clark County, Idaho? A. Yes, sir.

Q. Do you hold any official position there?

A. Sheriff.

Q. How long have you been sheriff? [236]

A. Four and a half years.

Q. Do you know the defendant Mr. Hair?

A. Yes, sir.

Q. In the year 1939 did you see him in Clark County? A. Yes I did.

Q. Did you have occasion to see him when he was driving a motor vehicle? A. Yes, sir.

(Testimony of Sid Close.)

Mr. Merrill: We object to this upon the ground that there is no proof that any incident ever came to the knowledge of Mr. Donnelly and/or the Reynolds Tobacco Company, and therefore it would be wholly immaterial.

The Court: This is admitted as far as the defendant Hair is concerned but the jury will not consider it as to Donnelly and the Reynolds Tobacco Company unless it is connected up.

Mr. Black: May our objection be considered as to this, on behalf of defendant Hair?

The Court: Yes, and it is overruled.

Q. Did you see him driving a motor vehicle in Clark County? A. Yes, sir.

Q. What kind of a motor vehicle was that?

A. A panel truck.

Q. Did it have any signs on it? [237]

A. Yes, sir.

Q. What was the sign or signs?

A. Reynolds Tobacco Company.

Q. Did you have occasion to see the truck and Mr. Hair in 1940? A. Yes, sir.

Q. And did you have occasion to see him and the truck in Clark County in 1941?

A. I cannot say in 1941.

Q. Have you had occasion to see it in 1942?

A. I don't remember.

Q. On the occasion on which you saw this truck and Mr. Hair, was he accompanied by anyone?

A. He was.

Q. Man or woman? A. Woman.

(Testimony of Sid Close.)

Q. How many times did you see him accompanied by a woman?

A. Several times, I cannot tell the number.

Q. Would it be six or seven?

A. Yes it would.

Mr. Black: I move to strike that answer for the purpose of an objection.

The Court: He has answered the question and the answer may stand.

Q. Did you have an occurrence up there in which any charge was placed against Mr. Hair for driving?
[238]

A. Yes, I did.

Mr. Black: I object to that as being incompetent, irrelevant and immaterial, and not tending to prove any matter in issue here.

The Court: Overruled.

Mr. Black: I move to strike the answer.

The Court: It may stand.

Q. Just state what you saw Mr. Hair do and what was done.

Mr. Black: We object to that as incompetent, irrelevant and immaterial, not tending to prove any issue here.

The Court: I think he can answer the first part of the question.

Mr. Merrill: May it be understood that it is introduced against only the defendant Hair and not as against Donnelly and the Reynolds Tobacco Company.

(Testimony of Sid Close.)

The Court: That is the Court's ruling until the matter is connected up.

Mr. Black: I think our objection goes to each question.

The Court: You may have that understanding.

Q. What did you do?

A. The prosecuting attorney came over to the office—— [239]

Mr. Black: The same objection and also this answer is not responsive, we object to his stating what someone else did.

The Court: What you did and what you saw.

A. What I done. This man was going up the road from one side to the other and I got in my car and went about a mile west of Dubois and picked the gentleman up and brought him back for reckless driving.

Q. Was anyone,—strike that,—was there a passenger with him at that time? A. Yes, sir.

Q. Was it a man or woman? A. Woman.

Q. What was the name that he gave at that time?

A. He gave his name as B. R. Hair.

Q. It was this same gentleman who is sitting here (indicating)?

A. Yes, sir, the same gentleman.

Q. Have you had occasion and did you observe Mr. Hair and his driving in your County from time to time?

Mr. Black: Of course, we have the same objection to this.

(Testimony of Sid Close.)

The Court: Yes, and the same ruling. Go ahead.

A. Yes, I have saw the man driving when I thought he was intoxicated, two or three times before that. [240]

Q. What would you say as to whether he was a reckless driver?

A. I would say he was a reckless driver.

Mr. Black: I move to strike that as a conclusion of the witness and not evidence of a fact.

The Court: I think it may be stricken. He may state the facts and then the jury may determine whether he was a reckless driver.

Mr. Davis: That is all.

Cross Examination

By Mr. Black:

Q. What time of day did you see him and charge him with reckless driving?

A. In the afternoon, between three and four.

Q. What he actually did was to attempt to turn around in the street.

A. Yes, sir, after turning around in the street he nearly hit or run into a couple of cars.

Q. He almost hit a car turning around?

A. I thought he was hit.

Q. The real reason was turning around in the street?

A. No, sir, in going up the highway he was driving one side to the other of the highway.

Q. That is on the regular highway that leads out of the town of Dubois?

A. Highway 81, yes sir.

(Testimony of Sid Close.)

Q. When did you say that was? [241]

A. I cannot say just what time it was, but between three and four o'clock.

Q. What year was it ?

A. 1939, the 18th day of July.

Mr. Black: Now, we move to strike all the evidence of this witness on the ground that it is covered by a motion heretofore made as to a separate incident, it is incompetent, irrelevant and immaterial in this case and highly prejudicial, being an entirely separate matter and occurred more than three years before this occurrence involved here.

The Court: Motion denied. Do you have any question Mr. Merrill?

Mr. Merrill: Our understanding is that the motion is sustained as to our clients.

The Court: That is right unless the matter is connected up.

Mr. Davis: Unless Mr. Donnelly has sufficient notice to convey notice.

MARK MANLEY,

being called as a witness on the part of the plaintiff after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Davis:

Q. Will you state your name?

A. Mark Manley. [242]

(Testimony of Mark Manley.)

Q. What official position, if any, do you hold in Bannock County?

A. Assessor of Bannock County.

Q. Do you have a record of the applications for motor licenses for the years 1939 to 1942?

A. I have.

Q. Do you have applications made by Rulon D. Hair in the name of L. R. Donnelly?

Mr. Merrill: Objected to as leading and immaterial. The pleadings admit the ownership of the car and the name in which the car was registered. This is wholly immaterial for any purpose and may be prejudicial.

The Court: Is the evidence admitted?

Mr. Davis: The applications show that they are signed by Mr. Hair, L. R. Donnelly by Mr. Hair. It is much clearer if we have the copies. Unless counsel admits that Hair was authorized to and did sign L. R. Donnelly by Rulon D. Hair or R. D. Hair, and that the license was issued to Donnelly on Hair's signature.

Mr. Merrill: That is incompetent. It is admitted that this automobile was owned by the Reynolds Tobacco Company and that it was registered in the name of L. R. Donnelly.

The Court: I don't understand [243] whether you admit the statement of Mr. Davis, that is, that your client's name was signed by Mr. Hair.

Mr. Merrill: It is not in issue here. Apparently they have another course in mind than in paragraph six of the complaint and paragraph seven of the answer.

(Testimony of Mark Manley.)

The Court: I will overrule the objection and see what the materiality is.

Mr. Davis: By way of explanation, I asked this witness to bring his originals and I asked him to make copies of the same. He wants to withdraw the originals and I will handle it in that way. If they can be introduced and passed to the jury, then we can stipulate that copies may be substituted for the originals.

The Court: It will be satisfactory to identify the copies.

Mr. Merrill: We have an objection if he wants to introduce them.

The Court: It is understood that if the Court admits them that you may substitute copies.

Q. Mr Manley, calling your attention to the application he made for the year 1939——

Mr. Merrill: ——We object to that as being entirely immaterial for any purpose. The car involved in this action was a 1941 Chevrolet. There [244] is no allegation in the complaint to sustain such a question.

The Court: Overruled.

A. Yes, I have it.

Q. In whose name does it show it was issued?

A. The 1939 license applied for by R. D. Hair and licensed in the name of L. R. Donnelly, 532 Judge Building, Salt Lake City, Utah.

Q. Is the original signed by Hair himself?

A. Yes sir.

(Testimony of Mark Manley.)

Mr. Merrill: Objected to as immaterial and a conclusion of the witness.

The Court: Objection sustained.

Q. Now, turn to 1940, have you the original application for that year?

A. The 1940 application was——

Mr. Merrill: That may be answered yes or no.

A. I have it.

Q. Who does that show the license issued to?

Mr. Merrill: Objected to, the exhibit itself is the best evidence.

The Court: Objection sustained.

Q. Do you have the application for 1941?

A. I do.

Q. And do you have the one for 1942? [245]

A. 1942, yes sir.

Q. Now, Mr. Manley, those are a part of your original files? A. They are.

Q. You have no objection to having them marked as an exhibit. A. No, I haven't.

Q. Calling your attention to exhibit 15, is that a part of your original files?

A. Yes, you asked if they were the originals.

Q. Are they a part of your original records?

A. Yes sir.

Q. Look at exhibit marked number 16, is that also a part of your original records?

A. Yes sir.

Q. Number 17 which has been marked is that also a part of your original official records?

A. Yes sir.

(Testimony of Mark Manley.)

Q. And number 18, how about that.

A. Correct, yes, it is.

Mr. Davis: That is all from this witness.

Mr. Merrill: No questions.

Mr. Black: Nothing.

RULON D. HAIR

Being called by the plaintiff for cross examination under the rules, having been first duly sworn, testifies as follows: [246]

Cross Examination

By Mr. Davis.

Q. You are Rulon D. Hair, one of the defendants here? A. Yes sir.

Q. Handing you exhibit 15 marked for identification, whose signature is that?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial for any purpose.

Mr. Black: We join in that objection.

The Court: He may answer.

A. Mine.

Q. Handing you exhibit 16, whose signature is that?

Mr. Merrill: The same objection.

The Court: Same ruling.

A. Mine.

Q. Now, you have been handed also exhibit 17, whose signature is that?

(Testimony of Rulon D. Hair.)

Mr. Merrill: The same objection.

The Court: The same ruling.

A. Mine.

Q. And now, exhibit 18?

Mr. Merrill: The same objection.

The Court: The same ruling.

A. That is mine.

Mr. Davis: We offer exhibit 15 in evidence. I ask that it be handed to counsel and I also ask to be permitted to substitute a copy. [247]

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial, and not tending to prove or disprove any issue in this case.

The Court: The exhibits may be admitted.

Mr. Davis: Did you want to object to each one.

The Court: I thought you had offered all of them.

Mr. Davis: I will now offer exhibits 16, 17 and 18.

Mr. Merrill: We object to each as being incompetent, irrelevant and immaterial. The ownership of the 1941 truck is admitted and no other truck is involved in this action. They are wholly immaterial for any purpose.

The Court: Objection overruled. They may be admitted.

Mr. Davis: That is all of this witness.

Mr. Black: No questions.

Mr. Merrill: No questions.

FREDRICK H. SMULLEN

being called as a witness on the part of the plaintiff after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Davis. [248]

Q. State your name?

A. Fredrick H. Smullen.

Q. Where do you live?

A. In the City of Pocatello.

Q. How long have you lived in the City of Pocatello?

A. Twenty-six years.

Q. You are on the Pocatello Police force.

A. Yes sir.

Q. How long have you been a policeman?

A. Over twenty years.

Q. Do you know Mr. Rulon D. Hair?

A. Not personally acquainted, but I have seen him before.

Q. You know him by sight. A. Yes sir.

Q. Did you have occasion to see him about the 15th of April 1939?

A. Yes sir.

Q. In the City of Pocatello? A. Yes sir.

Q. What time was it?

A. In the morning hours, I don't remember exactly the time.

Q. Was Mr. Hair in, or did he become involved in an accident?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial in this action and not within the pleadings.

Mr. Black: We join in that objection. [249]

(Testimony of Fredrick H. Smullen.)

I also object that it is not within the pleadings being a distinct incident and not connected with the incident here, or any incident for which proof of facts are admissible here. It is prejudicial because the whole facts cannot be presented in this case.

The Court: Overruled.

A. Yes sir.

Q. At that time.

Mr. Black: The same objection.

Mr. Merrill: We make the same objection.

The Court: Overruled.

A. Yes sir.

Q. Did you see the accident? A. Yes sir.

Mr. Merrill: The same objection and that it is immaterial for any purpose and not within the issues in this case.

The Court: The same ruling with the same understanding.

Q. Was Mr. Hair operating or driving the motor vehicle at that time?

A. He got out of the motor vehicle.

Q. What kind of a motor vehicle did he get out of?

A. A truck—a panel truck or panel body, owned by the Tobacco Company.

Q. Did anyone else get out of the truck at that time? [250] A. Yes sir.

Q. Who was that?

A. He gave his name as Eckersly.

Q. Was his name Leo?

(Testimony of Fredrick H. Smullen.)

A. I think that was the name.

Q. You saw them get out of the truck?

A. Yes sir.

Q. Did you see someone killed at that accident?

A. Yes sir.

Q. Who. A. Mr. Myers.

Q. Did you observe the rate of speed at which Mr. Hair was traveling at that time?

Mr. Black: We make the same objection and object on the further ground that it calls for a conclusion of the witness without having laid any foundation. Speed is not involved in this matter at all. It is not a question involved here.

The Court: He may answer yes or no.

A. Yes sir.

Q. Did you make an investigation of that accident immediately? A. Yes sir.

Q. How far were you from the accident?

A. About eighty feet.

Q. Where was it? [251]

A. The accident happened in the three hundred block on east Center Street.

Q. That is the main street that runs under the subway. A. Yes sir.

Q. As a police officer have you had occasion to observe the speed and to estimate the speed of cars?

A. Yes, I have had occasion to estimate the speed.

Q. That is a part of your official duty.

Mr. Merrill: Objected to as leading.

Q. Is that a part of your official duty?

(Testimony of Fredrick H. Smullen.)

A. Not as a patrolman.

Q. But as a patrolman you had done that. Have you appeared as a witness in cases where speed was involved?

Mr. Merrill: That is objected to as leading, and it is a double question.

Mr. Davis: Withdraw it.

Q. Have you investigated speeds of cars to determine the speed at which they are traveling?

A. Yes sir.

Q. At what speed was the car traveling at the time of the accident?

Mr. Merrill: Objected to in addition to the objection heretofore made to all this line of questioning, it calls for a conclusion of the witness and there is no showing that he has the [252] ability to determine that, or that he was in a position to determine it. It is immaterial for any purpose.

Mr. Black: Of course, we make that our objection.

The Court: Overruled.

A. I estimate at thirty-five miles an hour.

Q. Did you observe Mr. Hair after he was taken up, what was his condition?

Mr. Merrill: We object to that as immaterial for any purpose.

The Court: Overruled.

Mr. Black: We want to renew our objection, specifically to this question.

The Court: Overruled.

(Testimony of Fredrick H. Smullen.)

A. He seemed to be under the influence of liquor.

Q. Did you testify in the case involving this accident?

Mr. Merrill: Objected in addition to the other grounds that it is wholly immaterial and it is an attempt by counsel to do the very thing which Your Honor has directed counsel not to do.

The Court: I don't think that, but the objection is sustained.

Q. Did you ever see L. R. Donnelly, the gentleman sitting here (indicating)

A. No, I don't think so, I don't know that I did.

Q. Did he ever make any inquiry of you concerning that [253] accident?

A. I don't know that he did.

Q. You have been on duty as a policeman since April 1939.

A. Yes sir, excepting two months.

Mr. Davis: That is all.

Cross Examination

By Mr. Black:

Q. Mr. Smullen, this accident that you speak of happened on the streets of Pocatello and involved Mr. Myers.

A. Yes sir.

Q. Where was Mr. Myers when he got struck?

A. In the three hundred block on the north side of the street.

Q. With reference to being in the street or on the sidewalk.

A. About ten feet from the curb.

(Testimony of Fredrick H. Smullen.)

Q. What was he carrying, if anything?

A. A broom.

Q. A large street broom. A. Yes sir.

Q. What was the condition as to being wet or muddy?

A. The broom was muddy.

Q. Where were you when you first saw Mr. Hair's car?

A. In front of the Super Cream Ice cream parlor.

Q. That is about the middle of the block.

A. About a quarter of a block down.

Q. Where was Mr. Hair's car when you first saw it? [254]

A. Passed me in front of the ice cream parlor.

Q. Isn't it a fact that you know it was parked across the street in front of the Phoenix Cigar Store and was standing there before it passed you?

A. I didn't notice it.

Q. Do you know that was in the evidence.

A. It might have been in the evidence.

Q. In going from the Phoenix Cigar store to where it crossed the intersection of the two streets would be how far?

A. About two hundred and twenty-five feet.

Q. And then there was an intersection. How wide was the intersection? A. Sixty feet.

Q. As this car was going east along there, just prior to this accident do you know that Mr. Myers was on the sidewalk in front of the Pocatello House, on that corner?

(Testimony of Fredrick H. Smullen.)

A. I didn't see him there.

Q. You know that Mr. Myers was on the sidewalk by the lamp post and started across the street to go to his car, and about in front of his car——

A. ——No sir, I don't.

Q. Then you don't know how the accident happened.

A. I don't know just had it happened, no.

Q. You said that you saw this man Mr. Eckersly get out of this car. [255]

A. Yes sir.

Q. Where did they get out?

A. In front of the R. K. D. Bar.

Q. Were you there?

A. I was by Mr. Myers.

Q. That is how far from the R. K. D. Bar?

A. About a hundred feet on the opposite side of the street.

Q. Isn't it a fact that this accident occurred and then the car was driven up by the Drug store before either of them got out?

A. In front of the R. K. D. Bar.

Q. Where is that with reference to the Drug store?

A. A quarter of a block east.

Q. Were any lights on at that time in the morning.

A. Yes sir.

Q. At that intersection.

A. Yes sir.

Q. Don't you know that there was no light burning there.

A. Yes, there was a light.

Q. You saw it.

A. Yes sir.

Q. Did you hear the testimony of the other

(Testimony of Fredrick H. Smullen.)

police officers that the light was not burning, that it was turned off that morning?

A. I am talking about the street light.

Q. The street light there at the intersection.

[256]

A. The traffic light wasn't burning.

Q. You mean to say that this car was going at thirty-five miles an hour when it passed you at the Soda Fountain store there.

A. That was my estimate.

Q. From that place to the Phoenix Cigar Store was how far?

A. About two hundred and twenty-five feet.

Q. How long is a block there?

A. Three hundred feet.

Q. You were down about a quarter of the way.

A. About three-quarters from first street.

Q. There was nothing about the car that passed you except that it passed you going on East Center?

A. That's all, just passed me.

Q. Isn't it a fact that you testified in that other case that you were looking west and didn't see anything that happened until you heard the crash?

A. Yes sir.

Q. So you don't know what happened in connection with the accident.

A. The only thing I saw was the car running over Mr. Myers.

Mr. Black: That is all.

(Testimony of Fredrick H. Smullen.)

Redirect Examination

By Mr. Davis.

Q. There is a difference between the traffic light and the street light. [257] A. Yes sir.

Q. The street lights were on? A. Yes sir.

Q. Which side of the street was Mr. Hair on?

A. The north side.

Q. That would be the left side.

A. His left.

Q. Was Mr. Myers on his right side?

A. On the North side when I saw him.

Mr. Davis: That is all.

Recross Examination

By Mr. Black.

Q. You didn't see him cross from the Pocatello House, across to the place he was struck by this car.

A. No sir.

Q. You don't know how he got over there?

A. No sir.

Mr. Black: That is all.

Mr. Davis: That is all.

BEN BUSKIRT

being called as a witness on the part of the plaintiff after being first duly sworn testifies as follows:

Direct Examination

By Mr. Davis.

Q. State your name?

A. Ben Buskirt. [258]

(Testimony of Ben Buskirt.)

Q. Where do you live?

A. Pocatello, Idaho.

Q. What is your business?

A. Police officer, for the City of Pocatello.

Q. Do you know Mr. Hair, R. D. Hair?

A. Yes sir.

Q. Do you remember the occasion of Mr. Myers being killed in an accident?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial, prejudicial and not supported by any pleadings, or by any allegation of the pleadings.

Mr. Davis: Withdraw the question.

Q. Do you remember seeing Mr. Hair early in the morning of April 15, 1939?

Mr. Merrill: Objected to as incompetent, and immaterial and not tending to prove or disprove any issue in this case.

Mr. Black: I wish to renew our objection.

The Court: Overruled.

A. Yes sir.

Q. Did you see him driving a truck?

A. Yes sir.

Q. What kind of a truck was it? [259]

Mr. Merrill: May our objection go to this entire line of testimony?

Mr. Black: And our objections also.

The Court: Yes, and the same ruling is made.

Q. What kind of a truck was it?

A. A panel truck, half ton panel truck, I don't remember the make.

(Testimony of Ben Buskirt.)

Q. Do you remember the advertisement on it, if there was any on it?

A. Yes sir, R. J. Reynolds Tobacco Company, camels and prince albert.

Q. How many times did you see him that morning? A. Twice that I remember.

Q. Where was the first place you saw him in that truck? A. The El Rio.

Q. Where is that?

A. It is a night club on the American Falls Highway.

Q. Was there any passenger, or any other person in the truck with him at that time?

A. I didn't see him in the truck. I saw the truck there and I saw him inside, but I didn't see him in the truck at that time.

Q. Later did you drive behind that truck?

A. Yes sir.

Q. Where did you drive behind that truck?

[260]

A. We drove down north main street going into town.

Q. Who was driving the truck at that time?

A. I couldn't say.

Q. Mr. Merrill: Now we object to any further testimony along this line by this witness.

The Court: Overruled.

Q. Had you finished your answer. A. No.

Q. Go ahead and finish.

A. I couldn't say specifically, there was two people in truck of which he was one.

(Testimony of Ben Buskirt.)

Q. Who was the other person, a man or woman?

A. A man.

Q. Did you follow the truck any place?

A. It seems to me that there was some time elapsed there before I saw him again.

Q. Where did you next see him?

A. I was coming out of the east end of the Center Street Underpass and I came upon his truck again, he was in front of me between first and second.

Q. Did he keep traveling? A. Yes sir.

Q. Did he strike any object.

A. Yes sir, between Second and Third.

Q. Was that object a person?

Mr. Black: We object to that as [261] leading, in addition to our other objections.

The Court: Overruled.

A. I didn't see the truck strike anyone, I was back a good hundred yards from the truck at first. I didn't notice until after that part of the incident.

Q. How many people got out of the truck?

A. There was two. That was the first I noticed the truck again.

Q. Were they both men? A. Yes sir.

Q. Do you know the name of the other person that was in the truck besides Mr. Hair.

A. Yes sir.

Q. Who was that? A. Mr. Eckersly.

Mr. Davis: That is all.

(Testimony of Ben Buskirt.)

Cross Examination

By Mr. Black.

Q. You didn't see that accident when it happened?

A. I didn't see the accident part of it.

Q. You were at least a hundred yards away?

A. Yes sir.

Q. After the accident you came up to where it happened? A. Yes sir.

Q. In that block there, what building is on the corner of the block, the Southwest corner? [262]

A. The Pocatello house.

Q. A hotel? A. Yes sir.

Q. At the corner? A. Yes sir.

Q. From there to where it happened,—where this accident happened, what was the condition of cars being parked in front of the hotel?

A. It seems to me there was cars parked in front along there. I was driving quite a large car and I drove even with the truck before I could park. I wouldn't say how many.

Q. But there were cars parked there?

A. Yes, I would say that there was.

Q. If anybody came from the corner of the hotel out into the street they would have to pass along by one of those cars before they would be visible?

A. I don't know about that. I don't know the position of the cars or how far down the street they were parked.

Q. Did you see Mr. Myer's car on the opposite side of the street, that he was going to?

(Testimony of Ben Buskirt.)

A. I didn't know Mr. Myers and didn't know that he owned a car.

Mr. Black: That is all.

Mr. Davis: That is all.

The Court: We will recess until [263] 10 o'clock tomorrow morning.

(Admonition to the jury.)

10 o'clock A.M. October 22, 1943

The Court: In connection with the testimony of Sheriff Close, on the motion of Mr. Black on behalf of the defendant Hair, to strike that testimony, the Court will reverse its ruling on that and strike the testimony of the Sheriff as to the Defendant Hair.

Mr. Merrill: It was not admitted as to the other defendants.

The Court: It was admitted with the understanding that it *would connected* up.

Mr. Merrill: I will want to be heard on that.

The Court: Yes, I will hear you.

RUSSELL TUESHER

being called as a witness on the part of the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Davis:

Q. State your name. A. Russell Tuesher.

Q. Have you ever been a witness before?

A. No sir, I never have.

Q. Where do you live, Russell?

A. Montpelier, Idaho. [264]

Q. How long have you lived there?

A. All my life.

Q. What is your age? A. Thirty-one.

Q. What is your business?

A. Brakeman on the railroad.

Q. Avenell Newby was your sister?

A. Yes sir, she was.

Q. I call your attention to the gentleman, the third from the end (indicating) have you ever seen him before? A. Yes sir.

Q. And Mr. Hair here (indicating) have you ever seen him before? A. Yes sir.

Q. When did you see these two gentlemen?

A. Shortly after the accident that caused the death of my sister.

Q. Where did you see them?

A. In Montpelier.

Q. Who was with you?

A. My brother Cal.

Q. Where was that?

A. In front of the Burgoyne Service Station.

(Testimony of Russell Tuesher.)

Q. Did you have a conversation with Hair?

A. Yes sir.

Q. What was that conversation? [265]

A. I asked Mr. Hair where he was going and he said he was going home, and I said are you going home, I said, the young lady you were with last night was my sister and I don't think you are going, we don't like that.

Q. Was Mr. Donnelly there at that time?

A. Yes sir.

Q. Did he say anything? A. Yes sir.

Q. What did Mr. Donnelly say at that time?

A. He said, "good God, did you have a woman with you again, I didn't know that."

Q. What did Mr. Hair say?

A. He said "I did but I didn't tell you because I thought she was getting along all right."

Q. Did Mr. Donnelly say anything, or did you have a conversation with Mr. Donnelly about the Doctor or physician?

A. Yes sir.

Q. What was said?

A. Mr. Donnelly said "what is being done for her" and I said "we have as good a doctor as there is in town" and he questioned their efficiency, and I said "the best way to find out is to go to the hospital."

Q. Did you go to the hospital? A. Yes sir.

Q. Who went? [266]

A. My brother Cal, Donnelly and I.

Q. How did you go?

A. In an automobile.

(Testimony of Russell Tuesher.)

Q. Did Mr. Donnelly state anything further to you?

A. Yes, that he had trouble with this young man before; that he was through with him, and in the course of the conversation Mr. Donnelly offered me a job.

Q. What did you tell him?

A. I told him I had a good job on the Union Pacific.

Q. Did Mr. Donnelly go any place?

A. Yes sir.

Q. Where did he go?

A. The hospital to talk to the Doctor.

Q. Was your brother there when you had this conversation about having trouble with Mr. Hair before?

A. Yes sir.

Q. And did you go to the hospital?

A. Yes sir.

Q. Was there any conversation with reference to George Newby?

A. Yes sir.

Q. What did Mr. Donnelly say about that?

A. He said that I looked like a sensible young man and that I should mention to him that he needn't get the idea to sue this big company that it was too big a company to buck.

Q. And was there anything said about lawyers?

[267]

A. Yes, he said that some lawyer would come along and make George think he had a good case and that he would end up by spending a good sum of money.

(Testimony of Russell Tuesher.)

Q. Did he say anything more about Mr. Hair?

A. Yes, in the closing remarks of the conversation my understanding was that he said Mr. Hair was through with the Company that he couldn't use him any more.

Q. Did he tell you why?

A. Because he couldn't trust him, principally.
Mr. Davis: That is all.

Cross Examination

By Mr. Merrill:

Q. You had three conversations with Mr. Donnelly, one at the hospital, one after he came out of the hospital,—strike that,—one at the service station, one after he came out of the hospital and one at the police station?

A. The one at the police station and one walking home which I regard as the same conversation.

Q. In which conversation did you discuss the children?

A. I don't remember discussing them.

Q. Did you not tell him that the children had been with you during the night of Thursday night and on Friday?

Mr. Davis: Objected to as not proper cross examination.

The Court: He may answer.

A. The exact date I don't know. [268]

Q. Didn't you tell him you had the children with you?

A. One night but I don't know what date.

(Testimony of Russell Tuesher.)

Q. Didn't you tell him you went and got the children because their mother wasn't home?

A. The date I didn't know.

Q. Did you tell him you got the children?

A. Yes, that I got the children.

Q. And that they were with you?

A. Yes, I did.

Q. You live at Montpelier? A. Yes sir.

Q. You knew as a matter of fact,—did you not go over to the house where Avenell Newby and her husband and children had been living during the later evening just before this accident and take them to your house?

Mr. Davis: Objected to as incompetent, irrelevant and immaterial and it is not proper cross examination as to any conversation that he had which he testified to on direct examination.

The Court: Sustained as not proper cross examination.

Q. Did you not tell Mr. Donnelly in that conversation that you say was one of the conversations at the Police station or coming from it, in substance and effect that your sister had always been a problem child? [269] A. I did not.

Q. Did you not tell Mr. Donnelly in that conversation that she had told you that she was going out on Thursday evening? A. No.

Q. Just a minute, and did you not tell Mr. Donnelly in that conversation that you learned that your sister was going out with a tobacco salesman

(Testimony of Russell Tuesher.)

and that you begged her not to go, that was Thursday night preceding the accident on Friday about four P.M. and that you had pleaded with her not to go out with him and she said she was going anyway; that she had met a good looking tobacco salesman and was going out and have a good time? Did you not tell Mr. Donnelly that in that conversation?

A. I was not even there that night.

Q. Did you not tell Mr. Donnelly that in that conversation? A. No sir, I didn't.

Q. Did you tell him that you tried to persuade her not to go out?

A. I did not. I was not home that night.

Q. Did you not also tell him that late that evening you became worried about the children and went and got them and put them to bed in your home? Did you not tell Mr. Donnelly that?

A. No sir, I did not.

Q. You did go and get the children and put them to bed? [270]

Mr. Davis: Objected to as not proper cross examination.

The Court: Sustained.

Mr. Merrill: That is all.

CALVIN TUESHER

being called as a witness on the part of the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Davis:

Q. State your name. A. Calvin Tuesher.

Q. Have you ever been a witness before?

A. No sir.

Q. How old are you Calvin? A. Twenty.

Q. Where do you live? A. Geneva, Idaho.

Q. You are a brother of Avenell Newby, deceased? A. Yes sir.

Q. Calling your attention to the gentleman here, the third from the end (indicating) have you ever seen him before? A. Yes sir.

Q. And the other gentleman next to him, this way? A. Yes sir.

Q. Where did you meet them?

A. At Montpelier. [271]

Q. Where were you in Montpelier when you met them?

A. With my brother Russell in front of the Burgoyne service station.

Q. Did you hear any conversation at that time?

A. Yes sir.

Q. Did Russell say anything to Mr. Hair when they met there? A. Yes sir he did.

Q. What did he say?

Mr. Merrill: Objected to as no foundation is laid, when it was or the place.

(Testimony of Calvin Tuesher.)

Q. You heard your brother Russell testify?

A. Yes sir.

Q. How long was it after the accident in which Avenell was hurt was it that you had this conversation, or was the conversation had?

A. Shortly after.

Q. In what town? A. Montpelier.

Q. At what place?

A. Roy Burgoyne service station.

Q. Who was there?

A. Mr. Hair, my brother and myself, in which this gentleman said that he was going to leave town.

Q. Did Mr. Donnelly come up when you were talking, or when they were talking?

A. That's right. [272]

Q. What did your brother say?

A. He asked him where he was going and he said that he was going home, and my brother said in case you are interested that is my sister that is in the hospital dying now, and you are not going.

Q. Did Mr. Donnelly say anything?

A. Yes sir.

Q. What did he say?

A. He said "for God's sakes were you with another woman."

Q. Was anything said there with reference to the Doctor? A. That's right.

Q. By Mr. Donnelly? A. Yes sir.

Q. What did he say?

(Testimony of Calvin Tuesher.)

A. He questioned the efficiency of the Doctor because it was such a small place.

Q. Did you go any place then?

A. Yes, to the hospital.

Q. How did you go?

A. I drove George Newby's car.

Q. Who went with you?

A. My brother and Mr. Donnelly.

Q. Did you hear your brother and Mr. Donnelly have any further conversation? A. They did.

Q. What did Mr. Donnelly say? [273]

Mr. Merrill: Objected to and no time or place is fixed.

Mr. Davis: I will fix the time and the place, Mr. Merrill.

Q. In the automobile when you were driving to the hospital did they have a conversation?

A. Yes sir.

Q. Mr. Donnelly was in the car was he?

A. Yes sir.

Q. You were in the car?

Mr. Merrill: Objected to as leading.

The Court: He may answer.

A. Yes sir.

Q. Now, what did he say?

A. He said that Russell was very level headed, the coolest one in the bunch and he offered him a position. He said he couldn't trust Hair any more.

Q. Was there anything said about warning him before?

(Testimony of Calvin Tuesher.)

A. Yes sir, he said he couldn't trust him any more.

Mr. Davis: That is all, you may examine.

Cross Examination

By Mr. Merrill:

Q. Isn't it a fact that what Mr. Donnelly said to your brother about a position was that he asked if he had a position, or was working? Isn't that what he said? [274]

A. He offered him a position.

A. Isn't it a fact that he asked your brother if he had a position or was working?

A. Well, I don't remember the exact words.

Q. Would you say that was not what was said?

A. No.

Q. Don't you recall that what was said about a position, Mr. Donnelly asked your brother if he had a position or was working?

A. I don't remember just the words.

Mr. Merrill: I think that is all.

Mr. Black: I have no questions.

Mr. Davis: Is it agreeable that the Mother of Mrs. Tuesher may be excused, she wants to go home with the two children, and these two babies *is agreeable* that they may be excused?

Mr. Black: It is agreeable with me.

Mr. Merrill: Yes, that is agreeable.

The Court: They may be excused.

Mr. Davis: I have volume 41 of Corpus Juris and I ask permission to read from the American

experience table of insured mortality as it appears in Corpus Juris for the purpose of giving the life expectancy of one 28 years of age. [275]

Mr. Merrill: Objected to as not proper at this time, no foundation is laid, and it is incompetent as offered.

The Court: You may put it in the record.

Mr. Davis: The table shows, at page 216 of volume 41 Corpus Juris that the life expectancy of one 28 years of age to be 36.73 years.

Now, if the deposition of Mr. Darr may be read at this time. I will ask the Bailiff to hand it to me and I will ask Mr. Coughlin to take the stand for the purpose of assisting with the deposition. We want to offer the cross examination.

Mr. Merrill: We object to the introduction of any cross examination before the witness has testified on direct, it is utterly immaterial and it is not the proper way to proceed.

The Court: I think you may proceed.

Mr. Merrill: We further object to offering any of the deposition unless they offer the whole deposition. The cross examination is not understandable and cannot be properly construed unless the testimony in chief, to which the cross examination is had, is first in. If he offers any of it he should offer the entire deposition, and we object to proceeding in any other way. If he is to proceed with the cross- [276] examination over our objection then we certainly urge that he be required to put in the entire deposition.

The Court: What do you desire to do in view of the objection made?

Mr. Davis: We can offer any part of the deposition at any time, under the rule. If he wants to offer the entire deposition that is all right with me, but to refuse me the right to use it would not be proper. I am not offering it to prevent the rest of it from going *it*. If any of it is not understandable I am willing that any of the other proof go *go* in that may be in the deposition.

Mr. Merrill: We challenge his interpretation of the rule. The deposition was taken under stipulation and they are attempting to offer in evidence only parts of the deposition, leaving out portions and that would be confusing. If they put in any part of the deposition it is incumbent upon them to put it all in.

The Court: I think not. I think where the cross examination is not understandable then the direct examination may be put in by counsel. You may proceed.

Mr. Merrill: We will have our exception of course?

The Court: Yes, of course. [277]

Mr. Davis: I will read the questions and this is cross examination.

DEPOSITION OF E. A. DARR

Q. Mr. Darr, I believe you stated that Mr. Rulon D. Hair was employed by the Company some time in 1937.

Mr. Merrill: I object to that, there is no showing that he so testified.

The Court: You may answer.

A. July 20, 1937.

Q. Has Mr. Hair been in the continuous employment of the R. J. Reynolds Tobacco Company since that date, up until the time of this accident about which this suit is involved?

Mr. Merrill: May our objection go to this entire line of testimony upon the grounds that we have heretofore made?

The Court: Yes, and an exception is granted.

A. He had.

Q. This panel truck you spoke of, involved in the accident in the case at bar, was delivered to him some time in 1942?

A. On February 8, 1942.

Q. Was that a new Chevrolet panel truck at that time?

A. I am not certain, but I am inclined to think it was, since that agreement would have to be signed by a [278] salesman each time a new car or a car is delivered to him.

Q. Or a change of the car?

A. Or a change of car. He had previously signed a similar agreement in February 1928, which was the first time he had been given a car.

(Deposition of E. A. Darr.)

Q. What kind of a car was that you delivered to him at that time,—a Chevrolet?

A. I am unable to say. My records don't show.

Q. Well, the car you delivered to him in 1938, the first car, was that the only car that was delivered by the R. J. Reynolds Tobacco Company to Mr. Hair up until this car of February 1942?

A. That is correct.

Q. In other words, he has had in his possession two cars of the R. J. Reynolds Tobacco Company during his employment.

A. That is right. I think I must qualify that answer. Without examining our records, I would be unable to say whether there were just two cars or whether there had been a series of cars that had been delivered to him between February 1938, and February 1942.

Q. The first car that the R. J. Reynolds Tobacco Company delivered to Mr. Hair was the car in which he was involved in the accident in which Myers was killed in April 1939, is that right? [279]

Mr. Merrill: That is objected to in addition to the other grounds, that it is incompetent, irrelevant and immaterial; there is no pleading in this case to warrant the question.

Mr. Black: We want to interpose an objection so far as Hair is concerned. It is an isolated accident without all the facts being brought before the Court, nothing but the questions that are being asked. If it is permitted to go in we ask the Court to instruct

(Deposition of E. A. Darr.)

the jury that they cannot consider it so far as the defendant Hair is concerned.

The Court: He may answer the question but the answer will not apply in any way or be considered by the jury in any way as against the defendant Hair.

A. I would have to check the records to see if it was the identical car.

Q. But it was a car of the R. J. Reynolds Tobacco Company? A. It was.

Q. Whatever car he might have been using at that time? A. That is right.

Q. And the car that you delivered to him in February 1942, of the R. J. Reynolds Tobacco Company is the car that is involved in the injury of the plaintiffs' intestate in this particular accident?

A. That was my understanding.

Q. Have you ever seen Rulon D. Hair yourself? .
[280]

A. No, not to my recollection.

Q. Under whom does he work in that territory?

A. His division manager is L. R. Donnelly.

Q. Has Mr. L. R. Donnelly been Division Manager in that territory all the while since Rulon D. Hair became employed by the R. J. Reynolds Tobacco Company? A. He has.

Q. Does Mr. Hair make his reports to the Division Manager, Mr. Donnelly, or does he make them direct to the Company? A. Both.

Q. He delivers you a copy, or Mr. Donnelly a copy of the reports that he sends in from his work and business, is that right?

(Deposition of E. A. Darr.)

Mr. Merrill: That is objected to as not proper cross examination. It is incompetent, irrelevant and immaterial and no proper foundation is laid for it at all.

The Court: It may be admitted.

A. That is right.

Q. So Mr. Hair,—Mr. Rulon D. Hair then works and operates under Mr. L. R. Donnelly as Division Manager of that particular territory?

A. That is right, plus his direct connection with this office.

Q. But Mr. Donnelly, the Division Manager, is his direct [281] superior officer in the operation of the business for the R. J. Reynolds Tobacco Company, is that right? A. That is right.

Q. You did know, Mr. Darr, that Rulon D. Hair was involved in an accident with the R. J. Reynolds Tobacco Company truck on or about April 11, 1939, in which a man Myers was killed?

Mr. Merrill: To which we object that it is incompetent, immaterial and no sufficient foundation is laid, and the evidence of one act would not constitute incompetency under the rule that has been called to Your Honor's attention. This is in addition to our objection to all the evidence.

Mr. Black: And we object so far as defendant Hair is concerned.

The Court: The objection is sustained as to the defendant Hair, and overruled as to the other defendants.

A. Yes.

(Deposition of E. A. Darr.)

Q. Mr. Donnelly was the Division Manager at that time? A. That is right.

Q. I believe a suit was brought against the R. J. Reynolds Tobacco Company with the same defendants in that particular case as are the defendants in this case?

Mr. Merrill: We object to this on the ground that it is immaterial and not related in [282]

Mr. Merrill: Objected to as being immaterial and not related to any matter covered by the direct examination, it is not proper cross examination and there is no connection with any matters involved in this suit. That is in addition to the objections heretofore made to this line of testimony.

Mr. Black: I want to renew our objection to this.

The Court: The objection is sustained as to Mr. Hair, and as to the defendants Tobacco Company and Donnelly it is overruled.

A. I can't answer that without referring to the file, as to whom the suit was brought against.

Q. Have you a record of the pleadings or the papers that were served on the R. J. Reynolds Tobacco Company in that suit?

Mr. Merrill: The same objection.

Mr. Black: The same objection.

The Court: The same ruling.

A. It appears from the correspondence that Donnelly was joined as a defendant with the Company and Hair.

Q. You do not have a copy of the Court pleadings in that case?

(Deposition of E. A. Darr.)

Mr. Merrill: The same objection as previously made.

Mr. Black: The same objection.

The Court: The same ruling. [283]

A. Well, not all the Court pleadings. We have got here probably a copy of the complaint.

Mr. Merrill: I move to strike the answer as being incompetent, irrelevant and immaterial.

The Court: Denied, the answer may stand.

Q. Was that complaint served on the R. J. Reynolds Tobacco Company?

Mr. Merrill: I object to the question for the reason that it deals with matters foreign to this suit and it is incompetent, irrelevant and immaterial and not proper cross examination. This is in addition to our other objections.

Mr. Black: Defendant Hair makes the same objection that it does not apply here.

The Court: The same ruling.

Mr. Davis: The next is where counsel there offered a copy of the complaint. I am not offering the complaint, I think the fact that they were served is sufficient to prove knowledge. Now, I will turn to the question in the middle of page thirty of the deposition.

Q. Mr. Darr, when did you receive a report as to the accident of April 1939, April 11, 1939?

Mr. Merrill: The same objection.

Mr. Black: The same objection. [284]

The Court: The same ruling.

A. On April 15, 1939.

(Deposition of E. A. Darr.)

Q. From whom did you receive that information?

A. From L. R. Donnelly.

Q. He is the same L. R. Donnelly, your Division Manager?

A. That is right.

Q. Did you have an investigation made as to that accident which resulted in the death of Mr. Myers?

Mr. Merrill: Objected to as incompetent irrelevant and immaterial, as to any of the issues here, and not proper cross examination.

Mr. Black: Defendant Hair renews his objection also.

The Court: The same ruling, it is not permitted as to defendant Hair.

A. We received a complete report from Mr. L. R. Donnelly, and also from Mr. C. C. Roe, Department Manager under whose supervision both Mr. Donnelly and Mr. Hair were working.

Q. Did you receive more than one report from Mr. Donnelly or Mr. Roe as to this accident on April 11, 1939?

Mr. Merrill: The same objection.

Mr. Black: The same objection.

The Court: The same ruling.

A. We received the initial report of the accident, and [285] we received supplemental reports.

Q. How many supplemental reports did you receive?

Mr. Merrill: The same objection.

Mr. Black: The same objection.

The Court: The same ruling.

(Deposition of E. A. Darr.)

A. Well, there were quite a number of letters and telegrams in regard to developments in the case.

Mr. Davis: There appears introduced in evidence at that time exhibits b, c, d, e, f, g and h, and I now offer exhibit B, being a letter from L. R. Donnelly to Charles C. Roe, that was identified by Mr. Donnelly yesterday and I ask now to read it to the jury.

Mr. Merrill: We make the objection in addition to our other objections that it is incompetent, irrelevant and immaterial and that it does not tend to prove or disprove any issue in this case. That the letter is in no wise any proof of any matters here involved.

Mr. Black: May I make this objection that it is incompetent, irrelevant and immaterial so far as the defendant Hair is concerned, any matters passing between the Company and these employees, and may I have this objection without renewing it each time an offer is made? [286]

The Court: Yes, you may, and this objection is sustained as to the defendant Hair, and the same ruling is had as to all the correspondence between the Company and Donnelly, but as to the defendants Donnelly and the Tobacco Company it is admissible.

Mr. Davis: I will read exhibit B. "April 17, 1939, Salt Lake City, Utah. Mr. Charles C. Roe.

Inclosed please find a newspaper clipping that was cut from local paper. You will please note how the papers are playing up this accident. I know that the clipping is all wrong because I investigated

(Deposition of E. A. Darr.)

the accident myself. I will try to give you an account of the accident. Mr. Hair after leaving a cafe not quite a block away started to drive home going east on main street, after going across the following street a man loomed up in front of him from between two cars coming from the right curbing, Mr. Hair immediately applied his brakes that were in good working order and swerved his car to the left at the same time to try to miss the man. The man became confused and dodged back and forth and finally Mr. Hair hit the man a little to the left of the center line. Mr. Hair was on the left because he tried to miss the man that was coming from the right. You are well acquainted with the narrow streets in Pocatello and one doesn't have to go [287] far to be over the center line as there are only room for two cars on these streets opposite each other.

After hitting the man Mr. Hair stopped within 25 feet (car length) and then drove on a little farther to find a parking place along the curbing as there were cars lined up on both sides of the street. The distance he had to go to find this parking place was a little over 200 feet, the paper would make you believe that Mr. Hair could not stop within this distance. The police tried to place a drunken driving charge on Mr. Hair but this would not stick as they examined him and could not find that this was true, so they took this charge off and placed a manslaughter charge against him. The police had the company car parked on the street so that everyone could see it and cause public sentiment against Mr. Hair

(Deposition of E. A. Darr.)

to strengthen their case against him. When I got to Pocatello I tried to have the car released but they only got tough about it and so did I they thought they could pull a bluff. It was late around 10 P.M. Saturday so on Sunday I again went to the police station and pulled a bluff on them I told them I was having papers drawn up not only to have our property placed in a garage to safeguard the tobacco in the truck but also was looking over the matter of the unjust advertising that was being created by our car out on the street. I intimated that there might be a suit brought against the city due to this sentiment that was being [288] caused against the company. Well they couldn't release the car fast enough I placed it in a garage and invoiced the tobacco in it and took the tobacco over to Rino Candy Company for storage. The car is damaged in front quite a little will have to have a new radiator and the engine gone over I am having the Chevrolet dealer give me a bid on this car and then will find out how much it will take to have it repaired and will decide what is the best thing to do with it. I cannot have the car repaired until the first hearing that will take place on wednesday or Thursday. I drove back to Salt Lake late Sunday and will work with Craig Tuesday on my way up to Pocatello, I will stay for the first hearing as no doubt they will call me for a witness and then set the time for the final trial.

My car is about to fall to pieces so will pick up a coupe in Ogden on my way through there. The one

(Deposition of E. A. Darr.)

that we bargained for, the sedan delivery will come later. Yours very truly. L. R. Donnelly.

Mr. Davis: I now offer what is marked as exhibit C, a telegram.

Mr. Merrill: We make the same objection.

Mr. Black: We make the same objection.

The Court: The same ruling, admitted.

Mr. Davis: I will read this into the record: "Western Union. Received at,—CFA3 11—[289] Salt Lake City, Utah 15 730 A.

R. J. Reynolds Tobacco Company, Winston Salem N. Car.

R. D. Hair's car struck and killed man Pocatello, particulars later. L. R. Donnelly.

Mr. Davis: I now offer exhibit marked D in the deposition, being a letter from Charles C. Roe to the Reynolds Tobacco Company.

Mr. Merrill: The same objection that we made to the first exhibit offered.

Mr. Black: We make the same objection.

The Court: The same ruling.

Mr. Davis: I offer exhibit D marked for identification and a part of the deposition, pardon me, I will now read the exhibit.

"Denver Colorado, April 18, 1939.

R. J. R. I am attaching hereto a letter just received from Mr. Donnelly which is self-explanatory, together with a clipping relative to Mr. Hair's accident in Pocatello.

You will notice Mr. Donnelly states the car is damaged to quite an extent, and it would be my

(Deposition of E. A. Darr.)

suggestion, instead of having it repaired, get offers from Chevrolet dealers in Pocatello and Ogden, and plan on replacing this car with a new Chevrolet sedan deliver.

Regardless of who is placed in the Poc- [290] atello assignment, if a new car is purchased he would not want to be driving a car around the streets that had had a misfortune such as the old one. In other words we would be starting out with a clean slate, and naturally it would also help to hold down comment, etc., Yours very truly, Charles C. Roe."

Mr. Davis: Next I want to offer exhibit E, which is a letter to Mr. E. A. Darr.

Mr. Merrill: Objected to on the same grounds as stated in the objection to the first of this series of exhibits.

Mr. Black: And we make our same objection.

The Court: The same ruling.

Mr. Davis: I will read this exhibit. "R. J. R. No doubt you have received word from Mr. L. R. Donnelly of Salt Lake City relative to the car wreck that Mr. R. D. Hair had early Saturday morning April 15.

Just as soon as Mr. Donnelly received word of this wreck he wired me brief details of what happened I replied by wire for him to proceed to Pocatello and get full information as I planned on calling him long distance to see what actually took place.

Sunday afternoon, April 16, I called Mr. [291] Donnelly in Pocatello and he informed me Mr. Hair had taken his wife to the Station to catch an early

(Deposition of E. A. Darr.)

morning train at 4 A. M. and as he was returning back through town on Main street, which is a very narrow street, a street worker walked out between two cars. Mr. Hair ran into him which caused the street worker's instant death. Mr. Donnelly stated that this street worker was an old man, about seventy years old and could not see or hear very well, however, both the street worker and Mr. Hair probably thought no one else was out or around at that hour of the morning, which caused this accident.

I called the Maryland Casualty Company early Monday morning and gave them what information I had and they wired their San Francisco office the information I gave them.

Mr. Donnelly was not sure just when the hearing was to be held, either Monday or Tuesday of this week, but from the talk that was circulating around Pocatello, he thought Mr. Hair would be charged with manslaughter. I instructed Mr. Donnelly we would make no attempt to replace Mr. Hair until I arrived in Salt Lake City this week end, at which time I expect to have full information. Yours very truly, Charles C. Roe."

Mr. Davis: Next we offer exhibit F, being a wire copied in Mr. Darr's deposition.

Mr. Merrill: To which we object on the [292] same grounds as we objected to the first of this series of exhibits.

Mr. Black: We make our objection.

The Court: The same ruling.

(Deposition of E. A. Darr.)

Mr. Davis: On the last exhibit I read to the jury, the heading was Denver Colorado, April 18, now exhibit F, which is a telegram.

“Postal Telegraph CHA 19 59 NL XU Salt Lake City, Utah, 1939, Apr 23 PM 10 45.

R. J. Reynolds Tobacco Company, Winston Salem, N Car.

Hair is out on bond trial will be next month. Donnelly thinks he will come clear. Would you consider him to continue until out come is known. Donnelly regrets losing Hair due to his sales ability and past results. If possible would recommend we let Hair continue. Can have car repaired for small expense for time being. Wire instructions. Charles C. Roe.”

Mr. Davis: We now offer exhibit G in the deposition, being a Postal Telegram from Mr. Darr to Mr. Roe.

“Confirmation of serial message sent via Postal Telegraph Company. From R. J. Reynolds Tobacco Company, Manufacturers of Cigaretts, Smoking, Plug and Twist Tobaccos, Winston Salem N. C. Dated April 24, 1939. Mr. Charles C. Roe, care of L. R. Donnelly, 532 Judge Building, 8 East Broadway, Salt Lake [293] City, Utah.

Since Hair was using Company car on personal business our disposition is to get his resignation. However, willing approve your recommendation as to continuing him provided he agrees pay full cost repairs to Company car. EAD h f.”

(Deposition of E. A. Darr.)

Mr. Davis: Next is exhibit H which I now offer, and it is a letter from Mr. Roe to Mr. Darr.

Mr. Merrill: Our objection is also made to this exhibit.

Mr. Black: And our objection also.

The Court: There is so very much of this letter that is entirely immaterial and possibly prejudicial that I believe I will sustain the objection to this exhibit.

Mr. Davis: Very well, the next question is on page 39, if the Court is following in a copy.

Q. Mr. Darr, did those reports or your information show that Mr. Rulon D. Hair had with him at the time of the wreck of April 11, 1939, a guest in his car?

A. It showed that he did not have a guest with him at the time of the accident.

Q. Didn't you learn later that a man by the name of Esterly,—that should be Eckersly,—was a guest in the car at that time?

Mr. Merrill: We object on the other [294] grounds heretofore stated and the further ground that it is not proper cross examination.

A. I have never received any such information.

Q. Mr. L. R. Donnelly attended the preliminary trial in which Mr. Hair was indicted for manslaughter, didn't he?

A. I am unable to say.

Q. You don't know whether he was there or not?

A. I do not.

Q. Do you know that it was shown in the evidence of that trial there was a man by the name of Esterly

(Deposition of E. A. Darr.)

or some other guest with him at the time of that accident? A. I do not.

Q. You don't know that it was shown in the evidence of that trial there was a man by the name of Esterly or some other guest with him at the time of the accident? A. I do not.

Q. You never had any such information?

A. No.

Q. You knew that Hair was convicted of manslaughter, did you not, in the criminal courts of Idaho, in that particular wreck?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial, prejudicial and not proper cross examination. All of which is in addition to our previous objection and former objections.

Mr. Black: We renew our objection. [295]

The Court: The objection is sustained.

Mr. Davis: I assume that the Court will sustain the objection to the next two questions. I will now turn to page 41 of the deposition.

Q. Do you know that Mr. Rulon D. Hair had a license to operate an automobile?

A. I did not. I assumed that he had.

Q. You had no record of that at all?

A. No.

Q. From the time he first was employed by the Company, up until this last accident?

A. We don't require that proof to be given us that a man has a license. We assume that he has one.

(Deposition of E. A. Darr.)

Q. You would know, though, Mr. Darr, wouldn't you, that in most states if a man had been convicted of reckless driving to the extent of being convicted of manslaughter that his license would be canceled as a matter of law.

Mr. Merrill: Objected to in addition to the previous grounds stated, that it calls for a conclusion of the witness, and a legal conclusion at that.

The Court: Sustained.

Q. You didn't make any inquiry about that did you?

Mr. Merrill: The same objection, that question is too indefinite as it stands now.

The Court: Sustained. [296]

Q. And Mr. Donnelly or no one else of a superior officer ever made a report to you about that one way or the other did they?

Mr. Merrill: The same objection.

The Court: In view of the ruling on the other question, the objection is sustained.

Q. Did you know that Mr. Rulon D. Hair was convicted of reckless driving on July 22, 1939, at and near Boise.

Mr. Davis: That should be Dubois in the state of Idaho, and fined \$50.00 and the cost?

Mr. Black: We want to have our objection to all this matter.

Mr. Merrill: We make the same objection as heretofore made.

The Court: Sustained as to Hair. Overruled as to the other defendants.

(Deposition of E. A. Darr.)

A. That is news to me.

Q. Did you know that the record of that indictment was published in the Idaho Falls Post Register of that date?

Mr. Merrill: The same objection.

The Court: The same ruling.

A. I have no way of knowing that.

Q. Mr. Donnelly or no superior officer never made any notice of that fact, or report of that fact to you, did they?

Mr. Merrill: The same objection to [297] all this testimony.

The Court: He may answer.

A. No sir.

The Court: The objection of Mr. Black's is sustained as to the defendant Hair, that is understood.

Q. I believe you stated in a former interrogatory that you did have on one occasion a statement that Mr. Hair had had his wife as a guest on some trip to a station. I believe that is right, isn't it?

Mr. Merrill: We have our objection to all of this examination.

The Court: Yes, and the same ruling.

A. That was in connection with the April 1939, accident. He had taken his wife and daughter to the station, and the accident occurred on his way home.

Q. When did you get a report of the accident of September 11, 1942, in which Avenell Newby was killed?

(Deposition of E. A. Darr.)

Mr. Merrill: Objected to in addition to the other grounds made, that it is no proper cross-examination and that it is incompetent and immaterial.

The Court: Sustained.

Mr. Davis: If the Court please, the next letter that is offered in the deposition is the exhibit that was identified yesterday by Mr. Donnelly, it is admitted in evidence and it comes in here and I [298] would like to read it to the jury at this time.

The Court: You may proceed.

Mr. Davis: "Office of L. R. Donnelly, 213 Judge Building, Salt Lake City, Utah, September 15, 1942.

R.J.R. As a matter of information concerning an accident involving Mr. R. D. Hair in which his car was completely demolished and considerable of his merchandise lost or stolen.

Mr. Hair called me Saturday morning September 12th and informed me that he had had an accident twenty two miles north of Montpelier, Idaho. Since Mr. Hair did not give me all the details of the accident when he called me I naturally assumed that the accident was one of the usual nature. I had car number 8712 taken out of dead storage and serviced with the expectation of turning this car over to Mr. Hair. However, upon my arrival at Montpelier at 12:00 noon further details came to light upon my investigating further.

While Mr. Hair was traveling south on highway number 30, twenty-two miles north of Montpelier, he approached a semi-truck and trailer which was

(Deposition of E. A. Darr.)

over the center line thus causing Mr. Hair to drive onto the shoulder of the road which had become soft due to heavy rains. This threw his car somewhat out of control and in the interim he hit a rock with his right front tire [299] causing it to blow out. This then, caused his car to become completely uncontrollable. The car rolled over several times scattering tobacco and cigarettes all over the highway. A married woman passenger whom Mr. Hair had picked up was severely injured and was in need of immediate medical attention,—this he did not mention in his first report,—as was also Mr. Hair since he received a blow on his left ear. A passing motorist took them both to a hospital in Montpelier, Idaho, where medical attention was administered. After receiving medical attention Mr. Hair notified the Sheriff of the accident, but apparently before the wrecker arrived at the scene of the accident some of the merchandise was stolen by several passing motorists, according to eye witnesses at the scene of the accident. A list of the merchandise stolen will be sent to you along with his financial obligations to the jobbers.

After conferring with the doctor who was taking care of the woman involved I was informed that her condition was very serious and that she had a fifty fifty chance of surviving. Her injuries are internal and she is so seriously injured that X-rays are impossible at the present time.

Since Mr. Hair violated all Company rules and instructions concerning the carrying of passengers

(Deposition of E. A. Darr.)

I felt that I had to ask for his resignation which I did. His [300] resignation is enclosed with other papers relative to the accident.

In car number 8712 I took all the tobacco that was left and traded it in against outstanding receipts to a jobber located at Pocatello, Idaho.

Two bids which I received on the wrecked car are enclosed and of a time limit set by the bidders immediate action concerning acceptance is paramount. The towing charges on the wrecked car were paid by me and reported on my report. The car is in dead storage at Ford Garage at Montpelier, Idaho. Yours very truly L. R. Donnelly."

Mr. Davis: Now, the next question is on page 43.

Q. Is that the only report you received as to this accident?

Mr. Merrill: The same objection.

Mr. Black: The same objection for us.

The Court: Same ruling.

A. Well, we received a regular form of accident report that salesmen are supposed to submit when they have an accident, and we received one of those from Mr. Hair. In fact we received two, the first reports an accident and it doesn't show he was carrying a passenger.

Mr. Davis: Both of those reports are now introduced in evidence and have been received.

Mr. Merrill: All this was over our [301] objection.

The Court: Yes.

(Deposition of E. A. Darr.)

Mr. Davis: Now, on page 44.

Q. Were any other investigations made by the R. J. Reynolds Tobacco Company or anyone for them other than Mr. Donnelly's report?

A. No further investigation made since his resignation was immediately requested.

Q. I am talking about the accident, though. Was any other report made of the accident other than Mr. Donnelly's?

Mr. Merrill: Objected to on the grounds heretofore stated touching this type of testimony.

Mr. Davis: I will withdraw that question.

Q. Mr. Darr, was this automobile registered there in the name of the R. J. Reynolds Tobacco Company or Mr. L. R. Donnelly?

A. L. R. Donnelly.

Q. The title to the car, though, was really in the R. J. Reynolds Tobacco Company?

A. Legal title was in L. R. Donnelly.

Q. Well, is that the way you handle your cars in the territory of your salesmen, you put them in the name of the division managers?

A. I think that is universal. I think that is the general practice. [302]

Q. But the title to the car was registered in the name of L. R. Donnelly? A. That is right.

Q. But was really property of the R. J. Reynolds Tobacco Company? A. That is right.

Q. You say that you register all cars of the Company in the name of the Division Managers in the various territories?

(Deposition of E. A. Darr.)

Mr. Merrill: In addition to the standing objection to this testimony, I add the further objection that it is repetition.

The Court: The same ruling.

A. That is the general practice. There may be some exceptions.

Mr. Davis: The next question is one that you didn't permit to be answered in the interrogatories so I will pass that. The next is on page 46.

Q. Was there any reason,—I mean to say, was that any reason why the car would have been listed or registered in the name of L. R. Donnelly?

Mr. Merrill: The same objection and also that it is repetition.

The Court: The same ruling.

A. Cars are registered in Division Managers' names merely for convenience.

Q. Did you give your Division Manager, Mr. Donnelly, [303] instructions with reference to the salesman under him using the automobiles?

A. Oh, yes.

Q. The same instructions that you gave to Hair with reference to riding guests? A. Yes.

Q. And if your division manager, Mr. Donnelly, or any Division Manager found that a salesman was violating or knew of a violation of the salesman with reference to the hauling of guests or passengers, then it would be his duty to report that to you, would it not? A. Yes.

Q. And if Mr. Donnelly had any such evidence

(Deposition of E. A. Darr.)

there, he failed to report that fact to you, didn't he?

A. That is right. We have had no such report.

Q. You never heard or no report ever came to you that Mr. Hair ever hauled any passengers, ever hauled any guests in the Company's car with the exception of his wife, when he brought her to a station and had the first wreck in 1939, and this last wreck involved in this litigation in which Mrs. Newby was killed?

A. They are the only cases that have come to my attention or the attention of the Company.

Mr. Davis: The next quesiton I take it, Your Honor would not permit to be answered. Now, the top of page 49. [304]

Q. Was Montpelier, Soda Springs and Grace, Idaho, in Rulon D. Hair's district or territory on September 11, 1942?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial and not proper cross examination, in addition to the other grounds.

The Court: You may read the answer.

A. They were in his assigned territory on September 11, 1942.

Mr. Davis: That is all the cross examination. Does counsel desire that I read the redirect examination at page 49 of the deposition?

Mr. Merrill: Yes and the direct examination.

Mr. Davis: I am asking now about the questions at page 49, the redirect examination.

Mr. Merrill: Yes.

(Deposition of E. A. Darr.)

Redirect Examination

Q. Mr. Darr, I direct your attention to "Defendant's exhibit number I" heretofore introduced in evidence, being entitled Salesman's Agreement to who car is delivered, and ask you if you know the two signatures appearing on this instrument?

A. I do.

Q. Whose signatures are they?

A. One is the signature of R. D. Hair, and the other is the signature of L. R. Donnelly. [305]

Q. Where has this paper been kept since it was executed, Mr. Darr?

A. In our files, as a permanent record.

Q. Are those files kept under your supervision as Sales Manager for the R. J. Reynolds Tobacco Company?

A. They are.

Mr. Davis: There was an exhibit introduced here at the taking of the deposition, it was the one that was identified and it was read to the jury, exhibit I.

Mr. Merrill: We ask permission without waiving our objection to the manner in which this has been taken up. We ask that the testimony on direct examination be presented to the jury.

The Court: It may be presented as the evidence of the defendants. It will be placed in the record as your evidence. Whether you want to do it at this time or on the presentation of your case would be up to you.

Mr. Merrill: We will present it now. Whereupon the direct examination in the deposition of Mr. Darr was read by Mr. Merrill.

(Deposition of E. A. Darr.)

Direct Examination

Mr. Merrill: This is the direct examination of E. A. Darr.

Q. Will you please state your name? [306]

A. E. A. Darr.

Q. Where do you reside?

A. Winston Salem, N. C.

Q. What is your present employment, Mr. Darr?

A. Manager of the Sales Department of the R. J. Reynolds Tobacco Company.

Q. How long have you been connected with the R. J. Reynolds Tobacco Company?

A. Twenty-three and a half years.

Q. How long have you held the position as Sales Manager? A. Since December, 1937.

Q. Do you hold any other position with the R. J. Reynolds Tobacco Company other than sales manager?

A. I am also a director of the Company, having been elected in December 1937.

Q. What are your duties, generally, as Sales Manager, with respect to the Company's salesmen?

A. I have general supervision of all the salesmen all over the United States.

Q. Had Rulon D. Hair been acting as a salesman for the R. J. Reynolds Tobacco Company prior to September 11, 1942? A. Yes.

Q. When did he first become a salesman for the Company, if you know the approximate date? [307]

A. He was employed July 20, 1937.

(Deposition of E. A. Darr.)

Q. Mr. Darr, is there any other officer of the Company besides yourself who would know anything about the transactions of Rulon D. Hair in his capacity as a salesman for the Company?

A. No.

Q. To which officer of the Company would such information come? A. To this office.

Q. Is there any other officer of the Company other than to yourself to whom such information would come? A. None.

Q. Which officer, if any, of the Company would have supervision of the instructions or rules that might be given to Rulon D. Hair from time to time regulating his activities as salesman for the Company? A. No one *by* myself.

Q. Was a Chevrolet panel truck owned by the R. J. Reynolds Tobacco Company turned over to Mr. Hair in February of 1942 for his use as a salesman for the company?

A. That is correct, February 8, 1942. He had previously had a car.

Q. He had previously had a car that belonged to the Company.

A. That is right. This is just another car, a new car.

Q. What instructions, if any, Mr. Darr, were given by [308] the R. J. Reynolds Tobacco Company to Mr. Hair as to hauling or carrying guests or passengers in this truck?

A. These instructions were contained in a

(Deposition of E. A. Darr.)

printed form which was signed by Hair at the time the car was turned over to him.

Q. You have before you the printed form signed by Mr. Hair, about which you have just testified?

A. Yes.

Mr. Merrill: We now re-offer at this time for the purpose of clarification the exhibit offered in the deposition which has been offered and read to the jury.

The Court: Very well, it may be considered as admitted and read to the jury at this time.

Q. Was the Chevrolet truck referred to in this paper writing delivered to Mr. Hair by the Company at the time this paper was signed?

A. Simultaneously.

Q. Mr. Darr, is the prohibition against the hauling of passengers and guests a general rule of the R. J. Reynolds Tobacco Company, applicable to all salesmen using Company owned automobiles?

A. It is.

Q. Is that or is that not a fixed rule of the company? [309] A. Fixed rule.

Q. Now, in addition to the paper writing offered in evidence as defendant's exhibit number 1, were any other written instructions given by the R. J. Reynolds Tobacco Company to Mr. Hair with respect to his hauling guests or passengers in any vehicle belonging to the R. J. Reynolds Tobacco Company?

A. It is a matter of constant practice for the Company to keep salesmen reminded, both by direct

(Deposition of E. A. Darr.)

communications and through division managers and department managers who supervise salesmen's work, that under no circumstances must they carry any passengers with them other than employees of the Company. On that point here is a form letter dated November 4, 1937, which Mr. Hair received and of which we have his signed acknowledgment, where that rule is again called to his attention in the last paragraph, reading as follows: "You must not carry other passengers with you when using the car, except your Division Manager or an employee of the Company."

Q. Was a copy of the letter to which you just referred sent to Mr. Hair.

Mr. Merrill: I will read that again.

Q. Was a copy of the letter of instructions to which you have just referred, sent to Mr. Hair?

A. It was. [310]

A. *It was.*

Q. Is this paper to which you have just referred, an exact copy of the letter of instructions and directions sent to him?

A. That is an exact copy.

Mr. Merrill: The defendants Reynolds Tobacco Company and Donnelly now offer their exhibit number 2 in evidence and ask that it be taken as a part of this deposition.

The Court: It may be admitted.

The Exhibit was read at this point by Mr. Merrill.

Mr. Merrill: "Directors: James A. Gray, President. R. E. Lasater, Vice-President; J. W. Glenn,

(Deposition of E. A. Darr.)

Vice President; John C. Whitaker, Vice President; M. E. Motsinger, Secretary; S. Clay Williams, Chairman Board of Directors; W. N. Reynolds, Chairman Executive Committee; R. C. Haberkern, Purchasing agent; L. F. Owen, Traffic Manager; H. S. Stokes, Supt. Leaf Processing; P. Frank Hanes, Counsel; E. A. Darr, Manager Sales Department; R. J. Reynolds Tobacco Company, Winston Salem, N. C. November 4, 1937. S 22 C C

To our Salesmen operating automobiles.

We are sending you herewith accident report blanks. In case of accident, make out report of accident in triplicate, and send all three copies to [311] your division manager. In case you have a serious accident, report it to us by wire and follow up your wire with a report of accident as above requested by first mail.

In filling out the report blanks it is imperative that you answer fully every question appearing thereon. If an accident occurs and you are not at fault you should endeavor to secure settlement from the party causing the accident on the spot. As we do not carry insurance covering damage to our car, we therefore have to look to the other party for damages sustained by us.

You must not carry other passengers with you when using the car, except your Division Manager or an employe of the Company.

R. J. Reynolds Tobacco Company."

Mr. Merrill: At the bottom in quotation marks appear the words "I'd walk a mile for a Camel".

(Deposition of E. A. Darr.)

Q. Mr. Darr, do you have the signed acknowledgment of the letter of instructions just referred to which you received from Mr. Hair.

A. The original acknowledgment was sent to lawyers in connection with a previous case in 1939.

Q. Are they the same attorneys who are defending this present suit? A. Yes.

Q. As far as you know, do they now have that signed [312] acknowledgment by Mr. Hair?

A. It was sent to them?

Q. Did you have any knowledge or information that these instructions and rules of the Company with respect to carrying guests or passengers had been violated by Mr. Hair at any time?

A. In one instance only, in connection with an accident that the salesman had in April 1939, when it was found that he had taken his wife and daughter in a Company car to the railroad station and had an accident on his return home?

Q. What action, if any, did the Company take with respect to that violation, Mr. Darr?

A. We gave serious consideration to getting Mr. Hair's resignation; but after considerable thought, I decided to give him another chance. But we penalized him to the extent of making him pay \$70.95 repair bill to cover damage suffered by the Company car.

Q. What instructions, if any, were given him at that time as to his observing this regulation or rule?

Mr. Davis: Objected to for the reason that the answer is hearsay, I also object that it is incom-

(Deposition of E. A. Darr.)

petent, irrelevant and immaterial, and also that it is hearsay.

Mr. Merrill: It would come within the exception, it is followed up by the letters introduced [313] as their exhibits.

The Court: Objection overruled, you may proceed.

A. He was told by his Department Manager that if he was ever found to be carrying passengers in the future, there would be no second chance.

Q. Do you or the Reynolds Tobacco Company have any knowledge or information about any other occasion on which Mr. Hair hauled or carried any passengers or guests in this truck or any other truck owned by the Reynolds Tobacco Company?

Mr. Davis: Object to the form of the question as being bad and calls for a conclusion of the witness, he says "Do you or the Reynolds Tobacco Company". He is not the Company and this is a double question, I object as improper and calls for a conclusion of the witness.

The Court: It will be admitted and the jury can be the judges of the weight to be given to it.

A. None.

Q. Was any report ever made to you or to the Company to the effect that Mr. Hair had hauled a woman in the Company's truck or car in Dubois, Idaho, or at any other place?

A. No such report ever reached me of the Company. [314]

(Deposition of E. A. Darr.)

Q. I direct your attention to allegations in the complaint that the R. J. Reynolds Tobacco Company knew that Rulon D. Hair was in the habit of hauling guests in the company's truck contrary to instructions, and I ask you if that allegation is true? A. It is not true.

Q. Have you or the Company ever been informed of Mr. Hair being arrested on a charge of reckless driving?

Mr. Davis: We object to this in so far as the Company is concerned. This witness could only know whether he had been informed.

The Court: Of course, the witness is not here, I think I will permit it to go in and the jury can give it such weight as they feel it is entitled to. They will be the judges of that.

A. No such report has reached me or the Company.

Q. Did you or the company ever receive any information indicating that Mr. Hair was a careless or reckless driver? A. Never have.

Q. What reports, if any, have you or the R. J. Reynolds Tobacco Company received concerning any accident in which Mr. Hair was involved while operating a company truck or any other vehicle?

A. None, other than the one in April, 1939, previously mentioned. [315]

Q. Is that the case in which some pedestrian was killed? A. Yes.

Q. What has Mr. Hair's record been with the

(Deposition of E. A. Darr.)

Company as to being a careful and competent driver, Mr. Darr?

A. He has a record since April 1939, up to September 11, 1942, of having had no accident in connection with the Compnay car, and has received letters of commendation along with merchandise awards in April 1940, April 1941 and April 1942, which he won as a result of having maintained a clear record.

Q. What form of recognition was given to him for this record?

Mr. Davis: Objected to as being immaterial and a self serving declaration.

The Court: I think it is immaterial. Objection sustained.

Q. State whether or not the originals of those letters were mailed from this office, from your office as Sales Manager, and under your supervision, to Mr. Hair on the dates indicated?

Mr. Davis: We make the same objection to that.

The Court: The same ruling.

Q. Are those papers you have before you the exact carbon copies of the originals of the letters mailed to Mr. Hair? [316]

Mr. Davis: We make the same objection.

The Court: The same ruling.

Mr. Merrill: The defendant Reynolds Tobacco Company offers the three papers referred to by the witness and ask that they be marked for identification, the marks now being three, four and

(Deposition of E. A. Darr.)

five. I will ask that they be marked exhibits 19, 20 and 21.

The Court: They may be so marked.

Mr. Merrill: We now offer the exhibits marked 19, 20 and 21.

Mr. Davis: We object to the introduction as the objection has been sustained to the testimony regarding them. They are self serving and immaterial and incompetent.

The Court: **Sustained.**

DEFENDANT'S EXHIBIT No. 19

Rejected Oct 22 1943

Deft's Exhibit #1

Received

9/30/43 Reg.

Mar 5

1:30

.....Department

(Undecipherable)

MWM

G.R.B.

E.F.M.

Noted ZEB

File Proper

J.A.W.

3/18

Expense

Mar 18 1942

(Original)

Salesman's Agreement To Whom Car Is Delivered

R. J. Reynolds Tobacco Company,

Winston-Salem, N. C.

This will certify that there was delivered to me this 8 day of February, 1942, at Salt Lake City (City) Utah (State) one Sedan Del, Chev6 1941 Model A.A. Sedan Del, Motor Number A.A. 517606, Silver Tag Number 9020 with the regular and

(Deposition of E. A. Darr.)

special equipment, as fully explained in your letter of instructions which I have carefully noted, and which I do hereby agree to observe in operating car, and same will be followed to the best of my ability in making my services of more value as a salesman, while the car is in my charge. I further agree that I will be responsible for the car, its parts and equipment; and upon request will turn same over to you, your successor, or a duly authorized representative of R. J. Reynolds Tobacco Company.

I further agree that I will not use the car for any other purpose than that of furthering R. J. Reynolds Tobacco Company's business as directed by my Division Manager. I understand that under no consideration am I to permit anyone save and except an employee of R. J. Reynolds Tobacco Company to ride with me in the said car.

R. D. HAIR

(Salesman Sign Here)

Witness L. R. DONNELLY

(Division Manager's Signature)

G.R.B.

E.B.W.

J.A.W.

3/5

E.F.M. 3/17

(Deposition of E. A. Darr.)

DEFENDANT'S EXHIBIT No. 21

Rejected Oct 22 1943

June 12, 1940.

Expense
Jun 13 1940

Mr. R. D. Hair,
209 South 7th St., #4
Pocatello, Idaho.

Dear Mr. Hair:

We are greatly pleased at being able to send to you the enclosed card and key ring token as evidence of the fact that you have operated your Company car for a period of twelve months ending April 15, 1940 without an accident.

Thousands of automobile drivers in America are carrying or wearing tokens like this. Some have them engraved for "2 years" and a few for "3 years". This simply means that for one year—or two years or three years—they have successfully done their share towards saving lives on the highways by keeping themselves out of accidents. They have so well lived up to the rules and ideals of safe driving that they have been able to keep out of even those scrapes for which others would have been to blame.

These No-Accident Awards are not easy to win! They almost always mean that the operator of an automobile who has merited these awards has put real thought and effort into the matter of driving safely. They are not given for "good intentions", but are given only to those who have "delivered

(Deposition of E. A. Darr.)

the goods"—a reward for definite accomplishment in dodging the hazards that are encountered daily on the highways.

So we congratulate you on your clean twelve months' record, and we hope that this time next year we can exchange the enclosed for a two year token.

With best wishes, we remain,

rdm—edr

lrd—ccr

Deft. Exhibit 3

9/30/43 Reg-

Q. Mr. Darr, I direct your attention to an allegation in the complaint that the R. J. Reynolds Tobacco Company knew that Rulon D. Hair was a careless, reckless, and incompetent driver of an automobile, and I ask you if that allegation is true?

A. It is not true. On the contrary, we have commended him because no reports of any accidents or improper driving have ever reached us.

Q. Did you or the R. J. Reynolds Tobacco Company ever acquire any knowledge or information that Mr. Hair was in the habit of hauling guests in the company's truck? [317] A. No.

Q. As far as you know or the Company know, did he have any such habit?

A. Not that we knew of.

Mr. Merrill: The cross examination has been read into the record.

Mr. Davis: Now I want to present a matter in the absence of the jury.

(Jury excused with admonition.)

Mr. Davis: The question to take up in the absence of the jury is as to the admissibility of the conviction in Pocatello and any other convictions of the defendant Hair.

The Court: The only question I see is as to the admissibility as to the defendants Tobacco Company and Donnelly. Ordinarily it would be prejudicial and I wonder if counsel have any cases that apply to a plea of guilty. After considering this matter, the Court having heretofore admitted the testimony of Sheriff Close in connection with the reckless driving of the defendant Hair in Clark County with the reservation in the ruling, it is now the ruling of the Court that the testimony will be admitted as to the defendants Tobacco Company and L. R. Donnelly.

Mr. Merrill: To which defendants [318] R. J. Reynolds Tobacco Company and L. R. Donnelly specifically except and urge that at the time the testimony offered by the witness Close was given, the ruling of the Court was that it was not admissible against the Tobacco Company and Donnelly unless it should be connected up with additional proof, indicating that it was necessary that there should be knowledge brought to the defendants Donnelly and the Tobacco Company that such occurrence had happened, and that under such ruling the said defendants were in the position where

they could not either object to the testimony offered or cross examine the witness Close, and that the witness Close has now, and immediately following his examination, been excused and departed from the Court room, and we now object on the further ground that there is no evidence in the record showing or tending to show or reasonably indicating that the defendants Donnelly or the Tobacco Company knew or had any knowledge of any kind or character as to the conduct or actions of Hair in Dubois, Idaho, as suggested by the witness Close, but on the contrary shows definitely that they did not have such information.

The Court: The objection is overruled and exception granted. We will recess at this time until 1:30. [319]

1:30 P.M. October 22, 1943

The Court: After checking the record the last ruling of the Court as to the admission of the testimony of Sheriff Close, the record will stand in accordance with the original ruling.

Mr. Davis: And it stands as it was. At this time we offer in evidence plaintiff's exhibit 22 being the judgment docket of the Probate Court of Clark County.

Mr. Black: We object on the part of the defendant Hair on the ground that it purports to be a certified copy of the Probate Court. It is incompetent, irrelevant and immaterial, and cannot

be received as evidence in this Court, that Court not being a court of record.

The Court: As to the defendant Hair, the objection is sustained.

Mr. Merrill: On all grounds.

The Court: On the ground that it is incompetent, irrelevant and immaterial as to that defendant.

Mr. Merrill: The defendants Reynolds Tobacco Company and Donnelly object on the following grounds;

First; that it is immaterial and incompetent, particularly [320] because it is an attempted certified copy of the purported judgment of the Probate Court sitting as a Justice Court and therefore in that situation it is not a court of record and accordingly under the statute controlling such matters a certified copy is not admissible for any purpose whatever and is not to be accredited the dignity of a certified copy that a Court of record would be given.

Second: Upon the ground that it is incompetent, irrelevant and immaterial under the issues in this case particularly because there is no proof in the record of any kind or character effecting these two defendants showing or tending to show any act or thing which came to their knowledge, or of which they were acquainted or by reasonable diligence could have been acquainted in so far as this incident is concerned; that it is incompetent, ir-

relevant and immaterial because there has been no competent testimony adduced in this record in so far as these two defendants are concerned tending to show that they had any knowledge of any kind or character touching anything that Hair may have done in Clark County, and particularly of this incident; there is no testimony in this record against these defendants which has been connected up that would in any sense bind these two defendants in any of the matters concerned with said exhibit, and lastly, we further object on the [321] ground that this exhibit is incompetent, irrelevant and immaterial under any of the issues in this case as against these defendants and that the same is prejudicial.

The Court: It may be admitted.

Mr. Davis: I desire to read the exhibit at this time: "Probate Docket. Case 258. State of Idaho, Plaintiff, vs. B. R. Hair, Defendant.

In the Probate Court of Clark County, State of Idaho. Before Honorable William A. Patt, Probate Judge. Be it remembered that on this 19th day of July 1939. Complaint in writing on oath of Sid Close, Sheriff was filed, alleging that B. R. Hair of Soda Springs, Idaho, on or about the 19th day of July 1939 at Dubois in the County of *State* of Idaho, then and there being did then and there commit a misdemeanor, to-wit: by driving a motor vehicle on the public highway in a reckless manner. 18th day of July 1939, Warrant issued and delivered to Sid Close, Sheriff, for service. 19th day of July 1939 warrant returned. 19th day of July

1939, Defendant in Court, complaint read, and to said complaint he entered a plea of guilty. Case set for trial 10 o'clock A. M. Defendant fined \$50.00 and \$5.00 court costs. \$55.00 fine and court costs paid. The defendant discharged. [322] William A. Patt, Probate Judge. 19, subpoena issued for.....witness on the part of the prosecution, delivered to.....for service.19 , Subpoena returned, served on19 , Jury.....by..... and venire issued to.....for service, returnable19 , at....o'clock M.

Attorneys, John Black, Pocatello, Idaho for Plaintifffor defendant.

Costs, Officers' costs \$3.00 Sheriff fee \$2.00 total \$5.00 Witness fees,—Plff. Total Witness fees—Deft. Total Jurors' fees. Total. Total fees.

State of Idaho,
County of Clark—ss.

I, J. N. Hoppes, Probate Judge of the Probate Court, in and for Clark County, State of Idaho, do hereby certify that the above and foregoing is a full, true and correct copy of the judgment docket in the case of the State of Idaho, vs. B. R. Hair, as appears from the Book 1 Probate Docket Criminal, Clark County, page 258, and that the Judgment Docket from which said copy was made is the official criminal docket of the Probate Court of Clark County, State of Idaho.

In Testimony Whereof, I the said Probate Judge have hereunto set my hand and affixed the seal [323] of said Court this 8th day of October, 1943.

(Seal Probate Court) J. N. Hoops, Probate Judge.

Mr. Merrill: Could I add another ground to the objection?

The Court: You may.

Mr. Merrill: L. R. Donnelly and the Reynolds Tobacco Company further object to the introduction of plaintiffs' exhibit 22., upon the ground that it does not purport to *effect* or have anything to do with Rulon D. Hair or R. D. Hair living at Pocatello, Idaho, and employee of the defendants at that time, but it recites that it is a person known as B. R. Hair of Soda Springs Idaho, and could not and does not give any notice to anyone interested in the employee of the defendants, one R. D. Hair of Pocatello, Idaho.

The Court: Counsel contends that it is not the same party.

Mr. Merrill: It is a question of how this could give notice to any prudent person.

The Court: *I will* I will overrule the objection and admit it.

Mr. Davis: Plaintiff rests.

Mr. Smith: We desire to make a motion to strike certain showings in regard to the Pocatello and the Dubois incidents.

The Court: You may proceed. [324]

Mr. Smith: Comes now the defendants Reynolds Tobacco Company and L. R. Donnelly and moves the Court to strike all the evidence adduced herein pertaining to the so called Clark County or Dubois incident of about July 19, 1939, including exhibit, plaintiff's exhibit 22, and also the evidence pertaining to the so called Myers incident alleged to have occurred in Pocatello, Idaho about April 15, 1939, wherein the defendant Rulon D. Hair was involved and particularly the testimony of Sid Close and the testimony of F. H. Smullen and Ben Buskirt, and the testimony of L. R. Donnelly on cross examination so far as it has reference to the Pocatello incident, as well as the testimony of any other witnesses, if any, referring thereto, upon the following grounds;

First; That the showing or attempted showing of the plaintiffs is wholly incompetent to prove or attempt to prove that Rulon D. Hair on September 11, 1942 was an incompetent, driver of an automobile, in that a certain isolated incident, even if known, is wholly insufficient to prove habit of negligence or to prove that Hair was a reckless, careless and incompetent driver, and that attempted showing is wholly incompetent and insufficient to prove any negligence whatever on the part of the Reynolds Tobacco Company or L. R. Donnelly in their, or either of their employment, from and after [325] April 15, 1939, to and including September 11, 1942, in that a single and occasional act of negligence such as shown to have been committed

in Pocatello on April 15, 1939, coming to the knowledge of the employer, with no other act of negligence coming to the attention of the employer, of any negligence or incompetence on the part of Mr. Hair would in no wise render him unfit for employment so far as these two defendants are concerned, nor render them guilty of negligence in retaining him in their employ.

Second; on the further ground that as has been shown by the evidence thus far adduced that the incident in Dubois, Clark County, was not known to the defendant Reynolds Tobacco Company or L. R. Donnelly or either of them and therefore could have no bearing whatever upon the issue as to the knowledge of the employer of any alleged incompetency of said Rulon D. Hair in the driving of an automobile.

The Court: The objection is sustained as to the testimony of Sheriff Close, all other matters will be admitted, the objection is overruled as to all other matters.

Mr. Merrill: We understand that the testimony of Sheriff Close is stricken from the record.

The Court: The jury will not consider it in any way. [326]

Mr. Merrill: And that includes exhibit 22.

The Court: The exhibit remains in the record. Just the testimony of Sheriff Close is stricken, there seems to be nothing in the record,—no evidence to show that was conveyed to the defendants Donnelly or the Tobacco Company. The other is

allowed to remain on the ground that it is a record that would or could give notice. That is a matter for the jury.

Mr. Merrill: May we have an exception to that portion of the ruling of the Court adverse to us on the motion to strike.

The Court: Exception will be granted.

(Opening statement by Mr. Black and Mr. Merrill.)

RULON D. HAIR

being called as a witness on the part of the defendants, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Black:

Q. State your name. A. Rulon D. Hair.

Q. You are one of the defendants?

A. Yes sir.

Q. How old are you? A. Thirty-one.

[327]

Q. Where do you live?

A. Salt Lake City, Utah, at the present time.

Q. Prior to the time of this accident on September 11, 1942, where did you live?

A. I was living at Pocatello, Idaho.

Q. How long had you lived at Pocatello?

A. About five years, four and a half years.

Q. During the time you lived in Pocatello what was your occupation?

(Testimony of Rulon D. Hair.)

A. I was salesman for the R. J. Reynolds Tobacco Company.

Q. Since the 11th of September 1942,—what is your present occupation?

A. At the present time I am driving truck hauling coal from Helper mines to Salt Lake City.

Q. Directing your attention to Mrs. Newby referred to in the complaint, did you first meet her on the 11th of September 1942? A. No.

Q. When did you meet her?

A. The first time I ever met her was about,— I guess it was about one month previous.

Q. Previous to what?

A. To the 11th of September.

Q. Had you met her any time after that until this accident occurred?

A. On the afternoon of the 10th of September.

[328]

Q. What year? A. 1942.

Q. Where was that?

A. In front of the Ideal Billiards in Montpelier, Idaho.

Q. Was that in some building or on the street?

A. On the street.

Q. Did you meet her again that day any place?

A. I met her again about 9 P.M. the same day.

Q. Where was that?

A. In front of my cabin, at the Burgoyne cabins.

Q. What town? A. Montpelier, Idaho.

Q. Did you go any place from there with her or she with you? A. To the Areo Club.

(Testimony of Rulon D. Hair.)

Q. Where is that?

A. About six miles up the canyon on the Geneva highway.

Q. Is it a night club or restaurant?

A. A general restaurant and dancing place.

Q. Do you know who ran the place?

A. Jimmie and Minnie I think.

Q. McGee was it?

A. They run a restaurant in town.

Q. Did anyone go with you?

A. A couple one was named Rasmussen and I don't recall the other's name.

Q. At whose instance was Mrs. Newby with you at that time? [329]

A. When I first met her at the Ideal Billiards she recalled the first time I met her at the Areo Club, introduced by her sister, I knew her sister through a business connection, she recalled when I first met her. She said she was at the Club a couple of nights before and what a terrible time she had. I made the statement that I was going to dinner and she said "how about going along" and I said that there would be a couple of other men along too and that I had some reports to make out and for her to call me later in the evening.

Q. Was it following that telephone call that you went to the club?

A. We got the reports completed shortly after the telephone call and I told these fellows about——

Mr. Davis: We object to what he told these fellows.

(Testimony of Rulon D. Hair.)

A. We changed our plans and I decided to go down town and eat.

Q. What did you do?

A. We went to the Burgoyne cafe and ate dinner.

Q. Was Mrs. Newby with you? A. No, sir.

Q. When did you next see her?

A. She was walking up the street by the service station close to the cabin.

Q. Then it was from there that she and you and these [330] traveling men went to the club?

A. Yes, sir.

Q. How far is that from Montpelier?

A. About six miles.

Q. How long did you remain up there?

A. Stayed there until they closed and for a while afterward.

Q. What time did you leave the club?

A. I wouldn't know for sure but it was probably two or three o'clock.

Q. That would be in the morning of what day?

A. Of the 11th of September.

Q. Is that the morning of the same day this accident occurred? A. Yes, sir.

Q. And who was with you when you left the club?

A. Just Mrs. Newby and myself when we left the club.

Q. Where did you go?

Mr. Davis: Objected to as incompetent, irrelevant and immaterial as not tending to show any defense here, or any reason for the happening of this

(Testimony of Rulon D. Hair.)

accident unless there is some purpose that is not apparent now.

Mr. Black: It is to show how she came to be a guest and to show her participation.

The Court: He may answer.

A. From the club we drove to the street across from the cabin where I was staying. [331]

Q. Did you stop there? A. Yes sir, we did.

Q. What did you do there?

A. I asked her if I could get her hat. She had left her hat in our cabin.

Q. These cabins, yours and the other men, were they close or adjoining?

A. One other salesman and myself shared a double cabin.

Q. Did she go into the cabin with you?

A. No, sir.

Q. What did you do?

A. I didn't go into the cabin?

A. What did you do?

A. I asked if I should go after her hat and she said no that she was not ready to go home, and why didn't we go to the Oasis Club at Soda Springs and dance some more.

Q. What did you do?

A. I said that I had to work,—that I had work to do the next morning and shouldn't do it and finally I consented to take her.

Q. What did you do?

A. We drove to Soda Springs.

(Testimony of Rulon D. Hair.)

Q. What time did you get there?

A. At five o'clock.

Q. In the morning? [332] A. Yes, sir.

Q. On what date was that?

A. The 11th of September.

Q. Did Mrs. Newby remain there during the morning before you started back on the trip you had this accident?

A. Yes, sir.

Q. You remained in Soda Springs during that morning?

A. Yes, sir.

Q. What time did you leave Soda Springs to go on this trip just preceding this accident, this trip back to Montpelier?

A. About two-thirty, I didn't notice the time.

Q. Where did you first go when you left Soda Springs?

A. From Soda Springs I went to Grace, Idaho.

Q. What was the purpose of going back to Montpelier?

A. The main purpose was to take Mrs. Newby home and get my luggage.

Q. When you started out from Montpelier, where did you go first?

A. You mean when we started from Soda Springs?

Q. From Soda Springs? A. To Grace.

Q. Why?

A. One of these traveling men, the one that had the adjoining cabin to me had made the remark that he had to stop in Grace and call on a few dealers, and I [333] thought if he was there I could have

(Testimony of Rulon D. Hair.)

him inform my wife that I would be later than usual getting in that night.

Q. Your wife was where? A. Pocatello.

Q. Did you see him in Grace?

A. No sir, he had left.

Q. What did you do then?

A. Started driving to Montpelier.

Q. What was the condition of the weather?

A. Cloudy and raining quite hard.

Q. What was the condition of the weather, that is as to how it continued until this accident?

A. It rained to the time of the accident.

Q. You are familiar with the road from Soda Springs to Montpelier? A. Yes, sir.

Q. What is the distance from Soda Springs to Montpelier? A. Thirty-one miles I think.

Q. What kind of a road is it?

A. Surfaced road.

Q. What is the condition of the road as to whether it is smooth or rough when it is raining?

A. Stretches where it is smooth and some where it is rough.

Q. As to the place where this accident occurred what is the condition of the pavement there? [334]

A. It would be smooth all the way through there.

Q. As you left Soda Springs who was riding with you? A. Mrs. Newby.

Q. How many seats in that car? A. One.

Q. Where was she in the car?

A. Sitting on the passenger side.

Q. Who was driving the car? A. I was.

(Testimony of Rulon D. Hair.)

Q. From her position was she able to see anything that you could see, looking out ahead?

A. Yes, she could.

Q. As you drove from Soda Springs to the place of the accident state whether she made any protest or objection to your driving?

A. Never made any remarks about the driving at any time.

Q. From Soda Springs to the place of the accident did she make any remark about your driving?

A. No, sir.

Q. Was there any money paid for you taking her, or was this a gratuitous guest?

A. There was no money paid, no sir.

Q. Prior to the time you reached the point where this accident occurred do you remember passing some vehicle on the highway?

A. I remember passing a vehicle, yes sir. [335]

Q. Do you remember what vehicle it was?

A. No, at that time I didn't.

Q. You heard Frank McGuire, might that have been that you passed? A. Yes, sir.

Q. You heard his testimony that you were driving at a rate of speed, what is the fact as to your speed you passed that car?

A. I was driving about thirty-five before I passed him, I might have speeded up when I passed him.

Q. What about your speed after you passed him in going to the place of this accident?

A. I never watched the speedometer but it was never over thirty-five or forty at the most.

(Testimony of Rulon D. Hair.)

Q. As you approached the place you met this truck what happened, what would you say?

A. As I approached this spot this semi-truck with a big green body was coming toward me, a little over the yellow line, looked as if he continued to come over a little more and I turned off just to give him a place to pass and in doing so I must have sunk into the soft shoulder. I got off a little too far off the oil surface. At that time I heard a report like a tire blew out. I put it back on the road and this back end of the truck was heavy with tobacco. I went into a swerve, I didn't think I went off the road again. I was trying [336] to keep it on the oil so it wouldn't go into the borrow-pit. I had experience with it before. All at once it gave a lurch, I must have got off the brake and got on the accelerator and after that it went right over.

Q. Where did the lurch of the car occur?

A. Just before I went off the pavement.

Q. To what do you attribute the skidding of the car there after you tried to avoid being hit by this car?

A. As near as I can tell the skidding would be from the swerving of the back end of car and the front end together. I don't see any other reason for skid marks other than the brakes which I wasn't applying hard at that time.

Q. You were trying to keep the car from going off the road on one side or the other?

A. Trying to keep it from going off the road.

(Testimony of Rulon D. Hair.)

Q. At the time this happened it was still raining there? A. Yes sir.

Q. Describe to the jury how this truck was loaded, as to the weight or the heft of it.

A. It probably would weigh about four thousand pounds.

Q. The way that truck was built how much of the weight was on the hind wheels?

A. Most of the weight rides on the back wheels.

Q. The coach part that you put the goods in, where does that come with reference to the back of the front seat [337] the part *the* contains the goods?

A. Immediately back of the front seat there is a space of about ten inches between the screen and the driver's seat, that is left for advertising matter.

Q. There is a screen that screens off the part that the merchandise is in? A. Yes sir.

Q. Calling your attention to Plaintiff's exhibit 5 is that a picture of the truck that was involved in this accident? A. Yes sir.

Q. That shows the relative position of the seat in the car and how much of the weight is in the back of the truck?

A. It gives a pretty good idea, yes sir.

Q. Was the back of the truck,—strike that—what was loaded in the back end of the truck?

A. A variety of chewing tobacco, smoking tobacco and cigarettes. At that time there was quite a lot of chewing tobacco.

Q. Was it full or empty, the back end, that compartment?

(Testimony of Rulon D. Hair.)

A. The back end was full clear to the door.

Q. In your experience in driving trucks, does the weight of the back end have anything to do with controlling the car as you drive it?

A. It does if there is anything like a blown out tire [338] or the road is slick or if you go off on the shoulder of the highway, it would cause it to swerve.

Q. More than an ordinary car?

A. Yes sir.

Q. What position was the car in when it finally stopped?

A. The wheels were in the air, it was upside down.

Q. You and Mrs. Newby were still in the front seat compartment? A. Yes sir.

Q. Some witness testified that the horn was blowing?

A. The horn, no doubt, was stuck from a short or something, it was blowing.

Q. What did you do right after this occurred when the car went over and stopped. What was the fact as to whether you got hurt?

A. I had the side of my head and through here (indicating) injured. It was quite difficult to get out of the door on the driver's side. I had quite a time getting the door open; the seats were on top of us, and all I could do immediately was to try and get out and when I got out I went right around to see if I could get the other door opened and get Mrs. Newby out.

Q. What did you do with reference to that?

(Testimony of Rulon D. Hair.)

A. I couldn't get that door open, it was jammed shut. I was looking along the highway to see if someone was coming to try and get some help, and just after that [339] Mr. McGuire drove up.

Q. That is the Mr. McGuire who testified here?

A. Yes sir.

Q. What did you do then?

A. Asked if he could help me get her out. She was on the opposite side, and he helped me to get Mrs. Newby out of the car?

Q. What did you do then?

A. I asked if he couldn't determine what was causing the horn to honk and he didn't know any more than I did and we left the horn honking and took Mrs. Newby to the hospital.

Q. Did you accompany him and Mrs. Newby to the hospital?

A. Yes sir.

Q. She was taken to the hospital?

A. Yes sir.

Q. At Montpelier? A. Yes sir.

Q. What time of the evening was it when you got to the hospital, approximately?

A. It was probably around five o'clock.

Q. Had it quit raining at that time or was it still raining, if you remember?

A. I don't recall, but it was still dark and cloudy.

Q. Now, before you go any further, I want you to describe to the jury that semi truck that you met, what kind [340] of looking vehicle was it?

A. It was a large green cab compartment and part rests on the back four wheels of the tractor

(Testimony of Rulon D. Hair.)

part, probably stands about eleven feet high and about eight feet wide. It extends over the dual wheels on each side.

Q. Dual wheels on it? A. Yes sir.

Q. It is pulled by an engine part and the part they store good in is built up.

A. Yes, and rests on the back wheels of the tractor part.

Q. Did the man driving that stop at all?

A. No sir.

Q. Did you ever see that truck after that?

A. No sir, I didn't. He just passed me up, probably didn't know what was going on.

Q. You didn't see him since that time.

A. No sir.

Q. Did you notice the speed he was driving as he approached you?

A. I couldn't see the speed he was driving at.

Q. After Mrs. Newby was taken to the hospital what did you do with reference to her, if anything?

A. What was that.

Q. After Mrs. Newby was taken to the hospital, what did you do with reference to her?

A. I waited in the waiting room for about an hour to see [341] if I could determine the outcome of her condition.

Q. What did you do after that?

A. I went to the Chevrolet Garage to see if I could get a wrecker.

Q. Had you come across Mr. Bunderson, the Sheriff? A. No sir.

(Testimony of Rulon D. Hair.)

Q. Did you get a wrecker?

A. The Chevrolet Garage didn't have one available so I went to the Ford Garage.

Q. What did you do then?

A. I got a wrecker.

Q. And then what did you do?

A. I rode out to the scene of the accident.

Q. Who was with you?

A. Myself and the wrecker man.

Q. When you got to the scene of the accident was anyone there? A. Several people there.

Q. Who were they?

A. The Sheriff was the only one I knew.

Q. What did you do?

A. We completed getting the tobacco back in the truck and the door was wired shut and the wrecker brought it in to town.

Q. While you were there did you see Mr. Bunderson? A. Yes sir. [342]

Q. Did he ask you or did you tell him what caused the accident?

A. I don't recall that, I don't recall that I told him there, but I did tell him about the accident.

Q. At the scene of the accident?

A. I don't remember whether I told him there or not.

Q. Did you notice the tires on your truck after the accident? A. Yes sir, I checked them.

Q. Was anything wrong with any of them?

A. The right front tire had a large split in it, a blow-out.

(Testimony of Rulon D. Hair.)

Q. That was at the scene of the accident?

A. I didn't notice it until we got to the garage.

Q. You noticed it at the garage.

A. Yes sir, but I noticed a flat tire at the scene of the accident.

Q. Did you answer any questions that Mr. Bunderson asked you out there?

A. If he asked me any I answered him.

Q. Where did you put this truck when you got back to Montpelier?

A. It was taken to the Ford Garage. It was towed in.

Q. What else did you do about inquiring about Mrs. Newby?

A. I called on the phone after I got back. I don't recall whether it was in the garage or after I went to the Police station to file the accident report.

Q. Did you hear from *then*, or her anything?

[343]

A. I don't think I did.

Q. Did you hear anything about her that night?

A. I don't think I did.

Q. Did you do anything the next morning about inquiring about Mrs. Newby?

A. I called the first thing in the morning.

Q. Did you have a discussion with Mr. Bunderson, the Sheriff the next morning? That is, about the accident?

A. Yes sir.

Q. Did you talk to him the night of the accident?

A. Yes sir.

Q. Where was that conversation?

(Testimony of Rulon D. Hair.)

A. In the Police station at Montpelier.

Q. Who else was there?

A. I think the Chief of Police and one of the officers in town.

Q. At that time did he ask you or did you tell him how the accident happened? A. Yes sir.

Q. Do you remember what you told him as to how the accident happened?

A. I told him just how it happened; that I met a semi-trailer.

Q. Is that the time you made some report to the Sheriff in writing about it? [344]

A. I went over to make the report but he didn't seem to have any of these accident report blanks available. That wasn't his office and he didn't have any blanks available so we waited until the next morning.

Q. So it was the morning of the 12th that you saw him again.

A. I wouldn't say it was morning but it was the next day.

Q. Did you furnish him any information or answer the questions that he wanted to know?

A. Yes sir.

Q. Did you sign any paper about how the accident occurred?

A. I signed the accident report.

Q. What did you do with that before you left, did you give it to Mr. Bunderson, or did he take it?

A. Yes sir, he had that.

(Testimony of Rulon D. Hair.)

Q. Did he write anything on that report that you know of? A. Not that I know of.

Q. Calling your attention to exhibit 8, is any part of that in your hand writing?

A. Yes sir, this section is (indicating).

Q. On which page, the front part?

A. It is number 8.

Q. Is it that part that tells how the accident happened? A. Yes sir.

Q. Whose writing is the rest of that?

A. It is mine.

Q. That report was in your writing. [345]

A. Yes sir.

Q. You left that with the Sheriff?

A. All except this part here (indicating) is my writing.

Q. Whose is that?

A. I don't know whose it is.

Q. This report was made out where?

A. The Police Station in Montpelier.

Q. Did you go to the Sheriff's office in Paris to make any report? A. No sir.

Q. You were not there in connection with this case at all? A. No sir.

Q. Did you do anything about the injury you received in the accident? A. No sir.

Q. Did you have any Doctor look at it?

A. No sir.

Q. Can you tell the jury what effect the bump you got on the head had on you, if any?

(Testimony of Rulon D. Hair.)

A. I imagine it dazed me; at least I was dazed a little bit after I got out of the truck.

Q. After this accident did you do everything you could for Mrs. Newby to see that she got to the hospital and so on?

A. Everything I possibly could, yes sir.

Mr. Black: I think that is all [346]

Cross Examination

By Mr. Merrill:

Q. Mr. Hair, how long did you live in Pocatello? A. Four and a half years.

Q. Prior to that time where did you live?

A. Salt Lake City, Utah.

Q. And before that,—I will ask you, where were you born? A. Provo, Utah.

Q. How long did you live in Provo?

A. Until 1929.

Q. Your folks live in Provo? A. Yes sir.

Q. When did you commence working for the Reynolds Tobacco Company?

A. In July 1937.

Q. You had understood the instructions of the Company, did you not, with respect to the use of the truck? A. Yes sir.

Q. What were those instructions?

A. Not to carry passengers at any time outside of the Company employes, and to not use the car for personal business whatever.

Q. You had received those instructions?

A. Yes sir.

(Testimony of Rulon D. Hair.)

Q. How were those instructions given to you?

A. In writing and orally, some of them. [347]

Q. I am handing you exhibit marked number 20. Did you receive that bulletin?

Mr. Merrill: Now, I will offer that as a part of this record.

The Court: It may be admitted.

Q. Did you receive that bulletin?

A. Yes, I did.

Q. Did you make a reply to it after you received it?

A. I cannot say for sure, some of these call for a reply and some of them don't.

Q. I hand you defendant's exhibit 23 marked for identification and I will ask you if you ever say that instrument before? A. Yes sir.

Q. Is that in your hand writing?

A. Yes sir.

Q. Does that have anything to do with exhibit 20? A. It is the answer to it.

Mr. Merrill: We offer in evidence exhibits 20 and 23.

Mr. Davis: I don't think we have any objection to these.

The Court: Admitted.

A. Mr. Merrill: I wish to read exhibit 23 to the jury. It is on a letter head of the Reynolds Tobacco Company: "Idaho Falls, Idaho, March 17, 1938. S 22 c c. [348]

In case of an accident I am to fill out accident report in triplicate sending all three copies to my

(Testimony of Rulon D. Hair.)

division manager. Or if it is a serious accident I shall wire you immediately following it up with the regular form.

I will answer every question fully and if the other car is at fault I will endeavor to make settlement on the spot.

I shall never carry any passengers outside of my division manager."

That is signed R. D. Hair, Salesman.

Q. Now, Mr. Hair, I hand you what has been marked as defendant's exhibit 14, and I will ask if that bears your signature? A. Yes sir.

Q. That was the instrument under which you received the car you were using in September 1942?

A. Yes sir.

Q. That instrument is the agreement by you that you will not carry any passengers in that car other than an employe of the company? A. Yes sir.

Q. You thoroughly understood this requirement of you, did you not? A. Yes sir. [349]

Q. On the 10th of September 1942 when you went up to the Areo Club, you of course, knew you were violating the instructions of the Company?

A. Yes sir.

Q. What time did you go up to that Club, strike that,—you knew at that time that if the Company learned of any violation of that instruction that you would be discharged.

Mr. Davis: Objected to as a conclusion.

The Court: Sustained.

(Testimony of Rulon D. Hair.)

Q. What was your understanding would happen if you violated that instruction?

Mr. Davis: Objected to as that calls for his understanding and not for a fact.

The Court: I think the agreement is plain. He has signed it and he testified he understood it.

Q. What time did you meet this lady on the street in Montpelier on the 10th day of September 1942?

Mr. Davis: Objected to as repetition.

The Court: In view of the way this case is being tried I will allow him to answer.

Mr. Davis: And are the defendants permitted to cross examine their witnesses.

The Court: Under the Circumstances I think I will permit it here. Mr. Merrill can crossexamine this witness. [350]

A. It was about six o'clock I should judge.

Q. It was there that she said that she had been up to the Aero Club two nights before?

A. She said a couple of nights before; she could have mentioned two nights before.

Q. Was it then she asked if she could go up with you that night?

A. Yes sir.

Q. What words did she use?

A. I don't know the exact words, but I told her we were going up for dinner and she said "fine, how about going along and having a few dances."

Q. Was anything said about calling you later on the phone?

(Testimony of Rulon D. Hair.)

A. I said I had made arrangements to go for dinner and that I had reports to make.

Q. Did she call you on the phone that day?

A. No sir.

Q. The day before the accident?

A. Oh, yes.

Q. Where did she call you?

A. On the service station phone, they used that for an office.

Q. Who answered it, do you know?

A. No sir, not by name.

Q. Do you recall a boy named Durwood Perkins?

A. Not by name.

Q. Was there a boy that called you? [351]

A. Yes sir.

Q. Then you saw her next coming toward the Burgoyne cabin camp?

A. Yes sir.

Q. That was at the time you were returning from dinner, down town?

A. Yes sir.

Q. Did she get into the car then?

A. No sir, she didn't.

Q. What did you do then?

A. We invited her into the cabin and I introduced her to these other two gentlemen.

Q. How long were you in the cabin?

A. I don't recall.

Q. Was that where she left her hat?

A. Yes sir.

Q. What time did you leave for the Aero Club?

A. 9:30 or 10 o'clock.

Q. That was the night of September 10, 1942?

(Testimony of Rulon D. Hair.)

A. Yes sir.

Q. Thursday night? A. Yes sir.

Q. Then you were with her constantly from that time until the accident at about 4:30 the next day?

A. Yes sir. [352]

Q. Now, during that time that you were with her you were not doing any business for the company? A. None whatever.

Q. That entire time of approximately eighteen hours was a party of your own?

A. Yes sir, it was.

Q. Your trip over to Grace was to tell a Salesman to tell your wife that you would be late getting home that night. A. Yes sir.

Q. And when you left Grace you went back to Montpelier? A. Yes sir.

Q. And it was on the way back you had the accident? A. Yes sir.

Q. Your first object in going back to Montpelier was to take Mrs. Newby home?

A. That would be my first objective I guess.

Q. That is what you intended to do?

A. Yes sir.

Q. Up at the Aero Club the night before, did Mrs. Newby take any drinks?

Mr. Davis: Objected to as incompetent, irrelevant and immaterial and would not tend to prove or disprove any issue in this case.

A. Mr. Merrill: It goes to the type and character of woman it was, and it has another connection in this case as will be developed. [353]

The Court: We will recess for ten minutes.

(Testimony of Rulon D. Hair.)

3:05 P. M., October 22, 1943

The Court: He may answer the last question.

A. Yes sir.

Q. What character of drinks were they?

A. Mixed drinks.

Q. Intoxicating liquor?

A. I guess you would call them that.

Q. How many did she take, if you know?

A. All that I know of is two.

Q. What time did you go up there?

A. I judge around 10:30.

Q. May she have taken some drinks when you were not there?

Mr. Davis: Just a minute, I certainly want to object to that question——

Mr. Merrill: ——with draw it.

Q. Was there a bar at the place?

A. Yes sir, I guess you would say so.

Q. Was she dancing there at the place?

A. Yes sir.

Q. With others as well as yourself?

A. Yes sir.

Q. Intoxicating liquors were sold there at the bar.

A. Yes sir. [354]

Q. You got there about ten-thirty.

A. Yes sir.

Q. Stayed until about two-thirty.

A. Yes sir.

Q. Two-thirty in the morning?

A. Yes sir.

Q. Were there many people there?

(Testimony of Rulon D. Hair.)

A. I don't recall how many people there were, but there were other people here.

Q. The men that went with you left before you did.

A. Yes sir, they went home with someone else.

Q. What time did the place close up?

A. I don't recall what time they closed.

Q. After two or two-thirty you and Mrs. Newby left and came down to Montpelier?

A. Yes sir.

Q. You got down to the intersection of the road leading into Montpelier from the west with the main street of Montpelier?

A. It was across the street from the Burgoyne Cabins which would be in front of the little cafe there across the street from the cabins.

Q. That is when you asked her if she wanted her hat?

A. Yes sir.

Q. Did you know where she lived?

A. No sir. [355]

Q. Did you ask her?

A. I think it was mentioned in front of the pool hall, I don't think she told me.

Q. Did you ask her about taking her home at that time, in front of the cabins?

A. Yes, if I could get her hat and take her home.

Q. What did she say?

A. I don't remember the exact words but she said, "Why go home, let's go to the Oasis and dance some more".

(Testimony of Rulon D. Hair.)

Q. What was that?

A. She said: "Why go home, let's go to the Oasis and dance some more".

Q. What did you say?

A. I said I had to work the next day and I should not go.

Q. What did she say to that?

A. I don't recall.

Q. Well, what did you finally do?

A. I finally consented to go and take her over.

Q. Why did you go over to Soda Springs?

Mr. Davis: Objected to as incompetent, irrelevant and immaterial.

The Court: He may answer as to what he did.

Q. Why did you go to Soda Springs?

The Court: Mr. Davis objected to the question when he went over and the Court sustained [356] the objection. He may state what he did.

A. Went to Soda Springs to see if the Oasis was open.

Q. How far from Soda Springs is Montpelier?

A. About thirty-one miles.

Q. What time did you get to Soda Springs?

A. About four or five o'clock.

Q. You left the Aero Club about two-thirty?

A. Yes, that is as I recall it.

Q. That is about four miles from Montpelier?

A. Six miles, I think.

Q. How long did you remain at the road intersection before you determined to go to Soda Springs?

A. About five or ten minutes.

(Testimony of Rulon D. Hair.)

Q. Then did you stop on the way to Soda Springs? A. No sir.

Q. Then you arrived in Soda Springs sooner than five or four o'clock?

A. I don't remember what time it was.

Q. How fast did you drive?

A. We were taking our time.

Q. When you got to Soda Springs what did you do?

A. The Oasis Club was closed and I felt too exhausted to drive back so I went to the hotel and rested up.

Q. What Hotel did you go to?

A. The Enders Hotel.

Q. Both of you? [357] A. Yes sir.

Q. How long did you stay at the hotel?

A. 11 or 12 o'clock.

Q. The next day? A. Yes sir.

Q. That was September 11, the day of the accident? A. Yes sir.

Q. You had been at the Enders Hotel from five or six in the morning until eleven o'clock that day?

A. Yes sir.

Q. What did you do?

A. We went to the Oasis cafe and club for lunch.

Q. Did you get lunch?

A. We went in to have lunch and she suggested that we have a drink at the bar so I took her back and had a drink.

(Testimony of Rulon D. Hair.)

Q. How many drinks did she take?

A. One that I know of.

Q. Do you remember any more?

A. No sir.

Q. What did you do then?

A. Danced and played the slot machine and entertained ourselves there.

Q. You took that drink at her suggestion?

A. I wouldn't say that I took it at her suggestion. She suggested a drink and I took one with her.

Q. You remained there until when? [358]

A. It was around about two-thirty.

Q. At that time was anything said about taking her home?

A. I mentioned it several times that I should ought to leave.

Q. What did she say?

A. Let's have another dance and we would get busy and play the slot machines or something. I would mention it again. I mentioned it two or three times during the afternoon.

Q. Did she finally consent to go home?

A. Yes sir.

Q. What did you do?

A. I went outside the Oasis Club and looked up and down the street to see if I could see these salesmen friends of mine so I could notify my wife that I would be later than usual in getting home.

Q. What did you do then?

A. Drove to Grace for the same purpose.

(Testimony of Rulon D. Hair.)

Q. Did you see him at Grace? A. No sir.

Q. What did you do then?

A. Started to Montpelier.

Q. To take her home?

A. To take her home, yes.

Q. It was on that road that the accident occurred? A. Yes sir. [359]

Q. What was the condition of the weather?

A. Raining.

Q. All day?

A. I don't recall it raining all day. I didn't pay much attention to the weather when we were inside this Club.

Q. What kind of road is it from Soda Springs to the scene of this accident?

A. Oil surfaced road.

Q. Straight or otherwise? A. Both.

Q. Are there cross roads leading from it between these points? A. Yes sir.

Q. How many? A. I don't know.

Q. But you have seen cross-roads leading from this highway between these two points?

A. Yes sir.

Q. What was the character of the roadway as you came to what proved afterward to be the scene of the accident?

A. I don't know just how to answer that.

Q. Was it level or hills?

A. That road all through that section is rolling.

Q. Are there any rises over which you would

(Testimony of Rulon D. Hair.)

come in traveling that road in the immediate vicinity of the accident?

A. Yes sir, several rises.

Q. How close were you to the semi-trailer when you first [360] see it? A. I cannot say.

Q. Approximately, was it immediately on you or did you see it some distance away?

A. It was some distance away.

Q. Where was it on the highway?

A. To its left of the yellow line, just a little.

Q. How fast was it traveling?

A. I cannot say, I wouldn't know that.

Q. It was when you attempted to pass that semi-trailer that you went off the oiled portion of the road? A. Yes sir.

Q. What was the condition of the oiled portion of the road at that time?

A. It was still raining.

Q. What was the condition of the shoulder on the west? A. It was soft.

Q. Was it there that you ran into the shoulder and the soft part? A. Yes sir.

Q. That is where the blow-out occurred?

A. Yes sir.

Q. What did you do after the blow-out?

A. I tried to control it, tried to keep it from going off the embankment.

Q. Was there any comment made of your driving at that time? [361] A. No sir.

Q. Or as to the manner in which the car was being operated? A. No sir.

(Testimony of Rulon D. Hair.)

Q. At any time? A. No sir.

Q. I think you said that after the accident a passing motorist came along and helped you. How long was it after the accident that this passing motorist came?

A. I don't know. I know I had quite a time getting out of the car, the door was jammed a little, and then of course, I was upside down and I couldn't say how long it was.

Q. Would it be a few minutes or a half an hour?

A. Five or ten minutes, it would not be half an hour.

Q. What did the passing motorist do?

A. He came over to the truck to see if there was anything he could do to help.

Q. When did the horn catch?

A. After I rolled over was the first I noticed.

Q. Did you know the driver of the semi-trailer?

A. No sir.

Q. Did you see the license plates on it?

A. No sir.

Q. Did you know whose trailer truck it was?

A. No sir.

Q. Had you seen it before?

A. Never seen that particular one that I know of. I have [362] seen lots like it.

Q. After you came to Montpelier you went to the garage to get a wrecker to go out?

A. Yes sir.

Q. Did you go out with the wrecker?

A. Yes sir.

(Testimony of Rulon D. Hair.)

Q. Who was the driver of the wrecker?

A. I don't know the name.

Q. Was it Oxenbine?

A. I don't think I had occasion to ever hear it.

Q. How long were you out there?

A. I don't know for sure.

Q. Was the truck turned right side up by the wrecker?

A. I don't recall.

Q. How was it brought in to Montpelier?

A. By the wrecker.

Q. Were the front wheels lifted up or were they left on the ground?

A. Lifted up.

Q. Then it was brought in with the front wheels lifted up?

A. Yes sir.

Q. You noticed the blow-out or flat on the scene of the accident?

A. I didn't notice the blow-out but I noticed that the tire was flat.

Q. When you got to Montpelier did you examine the tire?

A. Yes sir. [363]

Q. What did you find to be the fact?

A. It was blown out, split, and cut through.

Q. You spoke of some tobacco, whose tobacco was that?

A. Well, it belonged to the Rino Wholesale Company until it was sold.

Q. You had gotten it from his place?

A. Yes sir.

Q. And was selling it for him?

A. Yes sir.

Mr. Merrill: That is all.

(Testimony of Rulon D. Hair.)

Cross Examination

By Mr. Davis:

Q. About how much did Mrs. Newby weigh, was she a small or large woman? A. Quite small.

Q. Were you afraid of her?

Mr. Merrill: Objected to as calling for a conclusion of the witness.

The Court: He may answer.

A. No sir, I wasn't.

Q. Who bought her the drinks, these two drinks she took at the Aero Club?

A. The two I know of, I bought.

Q. Who did the Camel Cigarettes that were in that truck belong to?

A. The entire amount of tobacco that was in the truck, I [364] got from the Rino Wholesale Candy Company.

Q. Who did it belong to?

A. To the Rino Wholesale Candy Company, until I paid him.

Q. You were not working for the Rino Wholesale Company? A. No.

Q. Then was this a part of your job, your company permitted you to haul that tobacco in this way? A. Yes sir.

Q. You were not hauling that contrary to the instructions of the Reynolds Tobacco Company?

A. No sir.

Q. You hauled it that way all of the time?

A. Yes sir.

(Testimony of Rulon D. Hair.)

Q. It was part of your job to haul tobacco for the jobber and deal with them? A. Yes sir.

Q. The Rino Candy Company is a jobber of the Reynolds Tobacco Company? A. Yes sir.

Q. Did you haul tobacco before for the Rino Candy Company?

Mr. Merrill: Object to what he did before.

The Court: He may answer.

A. Yes sir.

Q. And you were paid for that by your Company? A. Yes sir. [365]

Q. Now this trailer that you saw, you don't remember how far away it was from you when you first saw it? A. No sir.

Q. Was it soft that day on the shoulder of the road?

A. Yes, it was, I found that out afterward.

Q. And you found out that along all these side roads it would be quite soft?

A. I didn't find that out.

Q. Wouldn't these side roads be soft too?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial. These roads may have been graveled.

The Court: He may answer that if he knows.

A. I wouldn't know.

Q. Did you make any investigation to see if the truck had taken off on any side road?

A. No sir.

Q. Did you ask the Sheriff to make any investigation? A. No sir.

(Testimony of Rulon D. Hair.)

Q. Did you make any effort to find out the name of the driver, or who he was? A. No sir.

Q. That was a very large truck?

A. Yes sir.

Q. What kind of split was this on the tire?

[366]

A. An open cut on the tire.

Q. How long a cut? A. I don't recall.

Q. Was it two inches long?

A. I think it was longer than that.

Q. Was it three inches? A. I couldn't say.

Q. How pronounced a cut, how deep?

A. It was blown out in the center of the tire, two and a half or three inches wide.

Q. Was the rest of the tire in good shape?

A. Yes sir.

Q. Is this a rim center, or drop center tire,—strike that—Do you know what kind of tire that is?

A. A six hundred by sixteen.

Q. What is known as a balloon tire?

A. Yes sir.

Q. You don't know whether it was what is called a drop center or rim center?

A. No sir.

Q. You have driven trucks, done a lot of driving? A. Yes sir.

Q. This truck was more difficult to drive than a passenger car? A. Yes sir.

Q. You consider yourself a good driver? [367]

A. Yes sir.

(Testimony of Rulon D. Hair.)

Q. Had you ever violated this Company's instruction from the time you violated them in April 1939 until you took Mrs. Newby up to the Aero Club?

A. Yes sir.

Q. Where did you violate them?

A. One time in Clark County, in fact there were two times in Clark County, and at Montpelier on that occasion. You said after April 15th. Probably two or three other times that I don't recall. However, that wasn't in Clark County.

Q. You violated them twice in Clark County, twice in Montpelier and two or three other times, you don't recall.

A. Four or five times.

Q. You violated them with reference to hauling guests in the car?

A. Yes sir.

Q. Did you haul a woman guest in your car in Clark County?

A. Yes sir, that one time.

Q. Did you haul one there more than once?

A. My wife another time.

Q. That is the only two times that you violated them in Clark County?

A. That is all that I recall.

Q. You might have done so at other times that you don't recall? [368]

A. I wouldn't say for sure. I had my wife two or three different times. When I make the trip over to Pond's Lodge I would take her with me.

Q. That was after you and Mr. Donnelly had talked and Mr. Darr had taken you back and you were not going to violate the instructions any more?

A. That's right.

(Testimony of Rulon D. Hair.)

Q. You say that the back end of the car was quite heavy? A. Yes sir.

Q. A good deal more weight on the back than the front? A. Yes sir.

Q. Was it enough so that the front end tipped up? A. A little bit.

Q. As you drove along the front end tipped up?

A. It would make it a little lighter on the front.

Q. When it's raining you drive more carefully?

A. Yes sir.

Q. Did you see this tire taken off of the car, the one that was blown out? A. No sir.

Q. You don't know what the condition of the tube on the inside was? A. No sir.

Q. Calling your attention to Plaintiff's exhibit number 12, is that in your hand writing, the portions that are not printed? [369] A. Yes sir.

Q. Is that the form that you made out after this accident when Mrs. Newby lost her life?

A. At that time she had not lost her life, no.

Q. I mean the accident,—this is the report you made out after the accident? A. Yes sir.

Q. What did you do with that report?

A. Mailed it to the Company?

A. I call your attention to the answer to question 15, the question "Was driver on own business or that of owner?" The answer is "owner"; is that in your hand writing? A. Yes sir.

Mr. Merrill: Objected to as calling for a conclusion.

(Testimony of Rulon D. Hair.)

The Court: The answer may stand.

Q. Now will you look at exhibit 13, is that exhibit in your hand writing? A. Yes, it is.

Q. Is that the corrected exhibit?

A. Yes, this is the corrected exhibit.

Q. The first exhibit was not correct?

A. No, it wasn't, I could explain that.

Q. And you made this to correct it?

A. Yes sir. [370]

Q. Mr. Donnelly was there when you made this exhibit?

A. Yes sir, he was in town, I don't recall whether he was right there.

Q. You showed him the first one and he wanted you to correct it and make another?

A. I didn't show him the first.

Q. How did you happen to make the correction?

A. At the time I made the first one my impression was that Mrs. Newby was going to be all right, so I didn't report her as a passenger in the car, that is the reason I made the report as I did, after I learned that she wasn't improved,—after I found her condition I made this second copy.

Q. The copy you say was corrected?

A. As near as I know it was correct, yes sir.

Mr. Davis: I think that is all.

Recross Examination

By Mr. Merrill:

Q. With respect to exhibits 12 and 13 in answer to question number 15 "Was the driver on own business of that of owner?" You wrote "owner";

(Testimony of Rulon D. Hair.)

did you mean that you had been doing any business for the owner at the time of the accident?

A. At the time I wrote that I didn't pay any attention, however, I wasn't on business for the owner.

Q. Is that right, Mr. Hair? [371]

A. That is right.

Q. Counsel asked you on cross examination if you had told the Sheriff something about the trailer, now, did you tell the Sheriff about this semi-trailer? A. Yes sir.

Q. What did you tell him?

A. How the accident happened.

Q. Did you make reference to this semi-trailer in telling him? A. Yes sir.

Q. Do you know the report that Mr. Bunderson made?

A. Only what was brought out here in Court.

Q. Did you state the facts as they actually happened, to him? A. Yes sir.

Q. With reference to that accident, in the meeting of the semi-trailer, the running off the road and all?

A. Yes sir, as near as I can remember we went over it thoroughly.

Q. There were four or five times all told between April 15, 1939 and September 11, 1942 when you carried passengers or a passenger.

A. Yes sir.

Q. Did you ever report any such conduct to Mr. Donnelly or the Company?

(Testimony of Rulon D. Hair.)

A. No sir, I didn't.

Q. To your knowledge did they have any information concerning it? [372] A. No sir.

Q. You knew at the time that you had violated their rules? A. Yes sir.

Q. And you made no comment about it?

A. No sir.

Q. Nor said anything about it? A. No sir.

Q. How far is Clark County from Pocatello?

A. A little over a hundred miles to Dubois.

Q. A hundred miles. A. Yes sir.

Q. How far is Pocatello from Salt Lake City, Utah? A. 184 miles.

Q. How large a place is Dubois?

A. Probably a thousand, between five hundred and a thousand.

Q. Did you have any accident of any kind or character between the time of the one in Pocatello in April 1939 and the one in Montpelier, or near Montpelier, in 1942? A. No sir.

Q. That was over a period of three and a half years? A. None at all.

Q. Did you receive any awards for careful driving?

Mr. Davis: That is objected to as being incompetent, irrelevant and immaterial and also self serving.

The Court: I think the Court ruled [373] on this before. I think it is self serving.

Mr. Merrill: He said that he was an experienced driver.

(Testimony of Rulon D. Hair.)

The Court: But that would not prove his experience.

Mr. Merrill: We offer to prove that in January 1940, January 1941 and January 1942 the Reynolds Tobacco Company, based upon this man's experience as a driver, made him an award and wrote him commendatory letters in each of these instances by reason of the fact that he had no accident of any kind or character and that he received an award from a National Society as a result of his care during that period of time.

The Court: The offer is denied.

Mr. Merrill: Exception. That is all of this witness.

CARL OXENBINE

being called as a witness on the part of the defendants, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Black:

Q. State your name. A. Carl Oxenbine.

Q. Where do you live?

A. Montpelier, Idaho. [374]

Q. What is your occupation?

A. Mechanic.

Q. How long have you lived there?

A. Thirty-one years.

Q. Where are you working?

A. The Bear Lake Motors.

(Testimony of Carl Oxenbine.)

Q. Is that the Fort Motor Company?

A. They call us the Ford Motor.

Q. Were you working there in September 1942?

A. Yes sir.

Q. Did you have occasion to go with the wrecker out to where a car was off the highway and upside down?

A. I did.

Q. Who went out there with you?

A. Mr. Hair and Cecil Adams and employe of the garage.

Q. When you got out there did you observe the automobile out there?

A. Yes sir.

Q. What did you find with respect to the right front tire?

A. That was blowed out.

Q. How was the car located when you got out there?

A. Upside down facing north.

Q. What was the fact with respect to the tubing in the tire?

A. Well, that was the inner tube,—pieces of it was sticking outside of the casing. [375]

Q. How long a space was it that the inner tube was protruding from the tire?

A. On that type of tire when *the* deflate then there is a space between the tire and the rim, and it was sticking out between the tire and the rim.

Q. Was there a hole in the inner tube?

A. It must have been tore up for the pieces to be sticking out of the tire.

Q. Did you observe the roadway?

A. I noticed the tracks.

Q. What did you observe?

(Testimony of Carl Oxenbine.)

A. I noticed that there were tracks on the right hand side of the road going south and tracks in the mud.

Q. On the oil or the shoulder?

A. Yes sir, on the shoulder.

Q. How deep was it?

A. I would judge that it measured about three and a half or four inches.

Q. How long was it?

A. I imagine from the looks of it that the track was around three or four hundred feet long.

Q. Did that track lead on to the oiled pavement?

A. Yes sir, it cut across the pavement.

Q. Did it lead to where the car was?

A. Yes sir.

Q. What was the character of the roadway off to the west of [376] roadway, that is, west of the oiled pavement, if you noticed it, aside from being muddy?

A. That was more or less of a flat country through there.

Q. What was the character off to the side of the oiled pavement?

A. On the west side?

Q. Yes.

A. That didn't seem as deep, the borrow-pit is on the west side I believe, that was kind of a flat country all through there.

Q. Did you make an examination of the tire to determine what caused the blow-out?

A. I didn't remove the tire, I noticed it as we got ready to pick up the car.

(Testimony of Carl Oxenbine.)

Mr. Black: You may cross examine.

Cross Examination

By Mr. Davis:

Q. For what distance was the road straight on each side of the wreck?

A. I would say a quarter of a mile each way.

Q. That is was absolutely in a straight line?

A. Yes sir.

Q. You have had,—what type of tire was this?

A. That was a 600 by 16, I don't know the make, and how many ply, but it was mounted on a drop center rim.

Q. You have been a mechanic for how long?

[377]

A. I was working out for seven years.

Q. You have had considerable experience with blown out tires and fixing tires and observing them?

A. Some.

Q. In the tracks that you examined there on the road, was there any indication of a cut by the rim?

A. I never noticed it that close.

Q. If the tire was blown out with a truck that heavy would the rim cut the pavement?

A. It would not cut the pavement but it would leave a wider tire mark than in inflated tire.

Q. In your opinion how long would a tire of this type stay on the car, if the tire went down, with the car swerving back and forth?

Mr. Merrill: We object to that as calling for a conclusion and no proper foundation laid.

The Court: I will permit him to answer.

(Testimony of Carl Oxenbine.)

A. Not very long if the car was swerving bad.

Mr. Davis: That is all.

Redirect Examination

By Mr. Black:

Q. Did you notice whether the right front wheel was bent? A. Yes sir, it was bent.

Mr. Black: That is all.

Mr. Davis: That's all. [378]

JACK PERKINS

being called as a witness on the part of the defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Merrill:

Q. State your name. A. Jack Perkins.

Q. Where do you live? A. Montpelier.

Q. What is your business or occupation?

A. I operate an apartment house.

Q. What apartment house do you operate?

A. The Downing Apartments.

Q. Were you operating them in September 1942?

A. Yes sir.

Q. For how long prior thereto?

A. About a year and a half before that time.

Q. Did you know Avenell Newby?

A. Yes sir.

Q. Was she living in this apartment house?

A. Yes sir.

(Testimony of Jack Perkins.)

Q. How long had she been there prior to September 11, 1942? A. I don't know exactly.

Q. Was it a long time or a few months?

A. It was just about a month or somewhere in there. [379]

Q. What is the fact as to whether you served her with notice to vacate?

Mr. Davis: That is objected to as incompetent, irrelevant and immaterial.

The Court: I cannot see the relevancy of it, but you may have some purpose that the Court is not advised of. For the present I will sustain the objection.

Q. What is the fact as to whether you had complaints concerning her conduct, from the other tenants?

Mr. Davis: Objected to as incompetent, irrelevant and immaterial and not proper under any foundation laid, and it is leading.

The Court: It is leading but I will allow him to answer.

A. I did.

Q. What was the character of these complaints.

Mr. Davis: Objected to as incompetent, irrelevant and immaterial.

The Court: Sustained.

Q. State whether or not this complaint or the complaints caused you to serve notice on her to vacate?

Mr. Davis: Objected to as incompetent, irrelevant and immaterial.

(Testimony of Jack Perkins.)

The Court: He may answer.

A. I did. [380]

Q. When was the notice served upon her, to vacate?

Mr. Davis: Objected to as incompetent, irrelevant and immaterial.

The Court: Sustained.

Q. What was the character of this complaint that the other tenants had made to you concerning Mrs. Newby?

Mr. Davis: Objected to as incompetent, irrelevant and immaterial.

The Court: Sustained.

Q. What is the fact, if you know, as to whether or not disturbing parties were had at the apartment of Mrs. Newby during the period of time she was living there?

Mr. Davis: Objected to as incompetent, irrelevant and immaterial and no foundation is laid.

The Court: Foundation is not laid and it would be immaterial. Sustained.

Mr. Merrill: That is all.

Mr. Davis: That is all, I have no examination.

Mr. Merrill: I want to make an offer of proof with this witness.

The Court: You may go ahead with another witness and I will take the offer at the next recess.

L. R. DONNELLY

recalled as a witness on the part of the [381] defendants, having been heretofore duly sworn, testifies as follows:

Direct Examination

By Mr. Smith:

Q. You are the same Mr. Donnelly that testifies before in this case? A. I am.

Q. Just prior to September 11, 1942, what position did you hold with the Reynolds Tobacco Company? A. Division Manager.

Q. Where were your headquarters?

A. Salt Lake City, Utah.

Q. When did you first learn that there had been an accident in the vicinity of Montpelier?

A. I learned it first on the morning of the 11th of September.

Q. What did you do?

A. I immediately got in my car and drove to Montpelier, Idaho.

Q. Where did you first go when you got to Montpelier?

A. I first contacted Mr. Hair who was staying at the Burgoyne cabins, and started an investigation of the accident that he had been in, getting his version, and later I drove the car I was in down to the Fort Garage to look over the wrecked truck. I examined the wrecked truck and after that I went to the Police Station.

Q. At what garage did you examine the wrecked car? [382] A. The Ford Garage.

(Testimony of L. R. Donnelly.)

Q. In Montpelier? A. Yes sir.

Q. State whether or not you made an examination of the tires of the car. A. Yes sir.

Q. What did you find out. Describe what you found?

A. I found that the right front tire had a jagged three cornered cut at the center of the tire, the front tire with a better than six inch tear in the inner tube.

Q. From there where did you go?

A. After making an investigation at the garage I went to the Police Station first of all. I then transferred back to the Garage and went over the car, the wrecked car after getting Mr. Hair's version of the accident. At that time I didn't know there was a passenger in the car. I went to the Burgoyne cabins to make arrangements to stay that evening, and I inquired if Mr. Hair had made out an accident report and he said he had and had mailed it in. While we were at the filling station Mr. Tuesher and Mr. Newby and some other gentleman drove up.

Q. And what did they do?

A. Well, Mr. Tuesher he went over to the car where Mr. Hair was, he was standing along side of the car and he said: "You are not going to leave town", naturally I [383] was interested and I walked over and I heard him make the remark that the "lady that was in your car" then I said: "My God did you have a passenger in your car?" and Mr. Hair admitted it and I asked where the lady

(Testimony of L. R. Donnelly.)

was and he informed me that she was in the Clinic and I asked if I might see the lady, if he would drive me down, me not knowing where the hospital was. He consented to drive me down and I asked for permission to see the lady and found that she was not rational, she wasn't conscious; she was tearing her night gown off; she was out of her head. I came out and I went down the street and I met Mr. Newby and as asked about the condition of his wife and I told him I thought she had a fair chance of recovery. I also told Mr. Newby that I had to leave town and I wanted permission for him to leave town, that we had to take the tobacco back and turn it in and I said I wanted to leave and if it made him feel any better we would go to the Sheriff's office and I would guarantee his appearance at any future date. He accompanied me to the Sheriff's office and we made that arrangement.

Q. That was when you were at the Sheriff's office the second time? A. Yes sir.

Q. Who was there at that time?

A. The Sheriff was there.

Q. The Sheriff? [384] A. Mr. Bunderson.

Q. Who else?

A. Mrs. Hair, and his brother-in-law Mr. Tuesher and the Chief of Police and myself.

Q. Relate any conversation that was had, and by whom it was had.

A. I made myself known to the Sheriff; the first time I was there the Sheriff wasn't there, he was out on other business and I made myself acquainted,

(Testimony of L. R. Donnelly.)

I extended my card, and then I inquired,—this was after I got the release of Mr. Hair,—I inquired about his idea of what caused the accident and Mr. Bunderson said he made out a report, and I asked if he visited the scene and he said he had, and I explained to him that Mr. Hair told me how the accident occurred and asked his opinion and he said that he had been at the scene of the accident and that the car evidently had gone down the west side of the road and apparently struck a sharp object which threw the car out of control. I asked if he could have been crowded off the road and he said it was probable or it was possible that he could have been crowded off the road.

Q. Now, back to this first conversation that you had when you got there, when you and Mr. Russell Tuesher and the other Tuesher boy, Calvin,—

A. You mean at the filling station or the police station? [385]

Q. The first conversation that you had.

A. Mr. Newby was present also at the filling station, is that the one?

Q. Yes.

A. And Russell Tuesher?

Q. Did you make the remark—Hair was present at that time?

A. He was at the filling station.

Q. Did you make the remark; “My God did you have another woman again”?

A. I did not

Q. What was it that you actually said?

(Testimony of L. R. Donnelly.)

A. I said: "My God did you have another passenger with you."

Q. You rode down, you said, to the hospital with Mr. Newby and Mr. Tuesher?

A. With Mr. Tuesher and some other gentleman that turned out to be his brother.

Q. Relate any conversation that you had with Mr. Russell Tuesher on the way to the hospital.

A. I inquired, being the first that I found out about a passenger, I made inquiry who the lady was and he informed me it was his sister. Naturally I inquired how the accident happened and what he thought about it and he told me what he knew about the accident and by that time we reached the hospital which wasn't very far.

Q. At that time was anything said concerning the occupation [386] of Mr. Tuesher?

A. Not at that time.

Q. When was that conversation had?

A. After we left the police station we walked up toward the cabin and I asked if he was employed, if he was working.

Q. Was there anything said at that time by Mr. Tuesher concerning the children of Mr. and Mrs. Newby?

A. Yes sir, I naturally inquired, I found out the lady had two children and I asked where the two children were, and he informed me that his sister had been to his house on the 10th and she said that *he* had met a good looking tobacco salesman and that she was going out for a good time, and that

(Testimony of L. R. Donnelly.)

he tried to persuade her not to go, and later on in that evening when his sister had not arrived at home he went over to her apartment or wherever she lived and got her children and took them to his house and put them to bed. He also related that his Mother had quite a lot of trouble with this daughter since she was ten years old that she was a problem girl, and that he loved her very much and was going to stick by her.

Q. Was there, at that time or any other time, anything said relating to litigation?

A. No sir.

Q. Did you at any time tell Mr. Tuesher that Hair didn't [387] have any money?

A. No sir, I didn't.

Q. Did you tell him that the Company would fight any case if litigation was started?

A. I did not. I might add that I am in the sales department and not in the legal department.

Mr. Davis: Move to strike the answer as not responsive.

The Court: Yes, that may be stricken.

Q. Did you make any remark touching upon lawyers at all? A. Not at all.

Q. Now, when you ascertained that Mr. Hair had had a passenger in this automobile what did you do?

A. I told Mr. Hair that he realized he was through as far as the company was concerned.

Q. And what did you do?

A. I discharged him.

(Testimony of L. R. Donnelly.)

Q. What date did you discharge him?

A. It was on the 12th of September.

Q. Was that the date you go to Montpelier?

A. I got up there,—yes it was the date I got there, the accident happened on the 11th and I arrived there on the 12th.

Q. How long was it that you told Mr. Hair that he was discharged and that you were through with him after you found out that he had a passenger in this automobile? [388]

A. Immediately.

Q. Has he worked for you or the Reynolds Tobacco Company since, to your knowledge?

A. He has not worked for us since.

Q. State, if you know, whether Mr. Hair had ever violated the instructions given by both you and the Reynolds Tobacco Company to him, relating the carrying of passengers or guests in the Company truck?

A. No, only once that I testified to that I know of Hair violating instructions, that was in Pocatello.

Q. You heard Mr. Hair testify did you not?

A. Yes sir.

Q. You heard him testify that he violated these instructions as many as four, five or six times?

A. Yes sir.

Q. That was since the accident in Pocatello in 1939?

A. Yes sir, I heard that.

Q. State whether or not it came to your knowledge that he had so carried passengers in the Company truck?

(Testimony of L. R. Donnelly.)

A. It never came to my knowledge.

Q. What would have been the result had any such infraction of the Company rule come to your knowledge?

A. He would have been discharged.

Q. Did any infraction come to your knowledge after April 1939, the one in April 1939 in Pocatello, until the infraction in September 1942?

A. It did not. [389]

Q. Do you have any knowledge,—strike that—I think you stated that Mr. Hair was assigned his territory under you?

A. Yes sir, that is correct.

Q. Where did you have headquarters in that division, as division manager of the Tobacco Company?

A. Salt Lake City, Utah.

Q. State briefly what your duties were as division manager.

A. Supervising salesmen.

Q. Over how much territory?

A. Over Utah, part of Wyoming, almost all of Idaho, that is the extent of it.

Q. How many salesmen were under your supervision?

A. Now or at that time?

Q. At that time.

A. It is a seven man division.

Q. Where did you spend your time with reference to your work?

A. I spent a share of my time with each salesman and also running the Salt Lake City office.

Q. How much time did you allot to Idaho?

(Testimony of L. R. Donnelly.)

A. I endeavored to get around to each salesman once a month. However, sometimes I was not able to do this.

Q. That would be the average?

A. Yes sir.

Q. That would include Mr. Hair? [390]

A. Yes sir.

Q. Where would you generally see Mr. Hair?

A. Wherever he happened to be on the territory, and I was able to get to him.

Q. Where did you generally see him?

A. In all parts of his territory sometime or other. Pocatello was the place I saw him more often because here was his headquarters.

Q. After this accident occurred in Pocatello in April 1939 who was present at the conference you had with Mr. Hair relating to his re-employment?

Mr. Davis: If it has not been asked before I have no objection, but I think it is repetition.

The Court: In the interest of time he may answer.

A. I don't think I understand the question.

Q. You remember the incident of the accident in Pocatello in April 1939? A. Yes sir, I do.

Q. Was there any conference with Mr. Hair shortly after that time relating to his conduct and employment? A. Yes sir.

Q. And what was said at that conversation, and who was present?

Mr. Davis: I think this is repetition. [391]

(Testimony of L. R. Donnelly.)

The Court: Go ahead, but I am sure it is all in the record.

Q. Who was present?

A. Mr. Roe, Mrs. Hair, Mr. Hair and myself.

Q. What was said at that time?

A. We gave him to understand that if he had any passengers including his wife in the Company car, and if he used the car for anything other than Company business he would be discharged.

Mr. Merrill: You may examine.

Cross Examination

By Mr. Davis:

Q. You said that you would guarantee Mr. Hair's appearance at any time?

A. I said I would guarantee Mr. Hair's appearance if the Sheriff wished it.

Q. From April 1939 to September 1942 if you found that he had violated the instructions of the Company you would have discharged him?

A. Yes sir.

Q. You had authority to discharge him?

A. That's right.

Q. And employ someone in his place?

A. No sir.

Q. You had authority to discharge him in 1929 when you found he had violated the instructions, but you didn't do it? [392]

A. No sir.

Mr. Davis: That's all.

(Testimony of L. R. Donnelly.)

Redirect Examination

By Mr. Merrill:

Q. What was the reason for not discharging him at that time?

A. After investigating the accident and hearing part of the testimony given at the trial and also the recommendation of the jury and believing that what took place there could happen to anybody in this Court room, that I would give him another chance.

Mr. Merrill: That's all.

Recross Examination

By Mr. Davis:

Q. You didn't mean that the jury recommended that you give him another chance?

A. No sir, I didn't say that.

Mr. Davis: That is all.

Mr. Merrill: That is all.

JACK PERKINS

being recalled as a witness on the part of the defendants, having heretofore been duly sworn testifies as follows:

Direct Examination

By Mr. Merrill:

Q. You have testified that you had some complaints from other tenants concerning Mrs. Newby?

[393]

A. Yes sir.

(Testimony of Jack Perkins.)

Q. What were those complaints?

A. Noise and disturbances.

Q. From where? A. From her apartment.

Q. Was there anything said touching parties and visitors?

Mr. Davis: Objected to as being incompetent, irrelevant and immaterial.

The Court: Matters of his own knowledge he could testify to but not what was said in the complaints.

Q. Was it based on this complaint or complaints that you served her with the notice to vacate and move out? A. Yes sir.

Q. Did she respond to the notice and move out?

A. No sir, the notice was served I think the same day the accident happened.

Q. Was her husband there much of the time?

A. I don't know.

Mr. Merrill: That is all.

Cross Examination

By Mr. Davis:

Q. These complaints were about the children, she had three children in the apartment.

A. She had two children.

Q. Was there a complaint that they were running up and [394] *and* down the halls?

A. That is one of the complaints.

Mr. Davis: That is all.

Redirect Examination

By Mr. Merrill:

Q. What was the other complaint?

(Testimony of Jack Perkins.)

A. Of noise and disturbance in her apartment.

Q. Had you seen crowds there?

A. No sir.

Q. Were there any complaints touching crowds that went there? A. No sir.

Mr. Merrill: That is all.

Mr. Davis: Yes, that's all.

Mr. Merrill: We want to offer the deposition of Durwood Perkins, and this testimony was taken pursuant to stipulation of counsel for all parties. I will read the questions and have Mr. Smith read the answers.

DURWOOD PERKINS:

Direct Examination

Q. Will you state your name, please?

A. Durwood Perkins.

Q. And where do you reside, Mr. Perkins?

A. I live at Montpelier, Idaho.

Q. What is your age?

A. Eighteen years. [395]

Q. Will you state whether or not you are subject to call in the military draft?

A. I will leave in the month of August, as near as I can tell now.

Q. During the fore part of September, 1942, would you state where you worked, or by whom you were employed?

A. I was employed by Joseph Burgoyne, and he

(Deposition of Durwood Perkins.)

owned or had leased, a service station and auto court.

Q. Where? A. Montpelier, Idaho.

Q. As an employee of Mr. Burgoyne, would you state briefly your duties in that employment?

A. I came on work at six o'clock in the evening, and I worked from then until closing time. I watched the service station and cabins. I was there alone from nine o'clock in the evening until closing time.

Q. Now, during the fore part of September, 1942, would you state whether or not you knew, or had become acquainted with Rulon D. Hair?

A. Yes, I knew him on sight. I knew he was a Camel cigarette salesman.

Q. Where was he staying at the time you knew him, or became acquainted with him?

A. He was staying at the Burgoyne cottages. That is the auto court I work at.

Q. During the times he was staying at the Burgoyne cottages [396] during the fore part of September, 1942, will you state whether or not you knew of some lady calling him by telephone?

A. Yes, I did. Do you want me to tell about it?

A. No, not until I ask you. Will you now state the approximate time of day that the telephone conversation came in, and who answered the telephone, what was said over the telephone and what you did?

Mr. Davis: Objected to as no foundation is laid for any conversation, and it is not shown that he knew their voices or knew who it was talking.

(Deposition of Durwood Perkins.)

The Court: You may read the answer.

A. Well, the call came between seven and nine o'clock in the evening, and a lady called the service station and asked if I would call Mr. Hair to the phone, and I told her at that time I didn't know any Mr. Hair. She told me it was the Camel cigarette salesman, and asked me if I would call him to the phone, and I said I would, and I asked her if I should say who was calling. She said: "Just say Avenell is calling."

Q. Pursuant to that telephone call what did you do?

A. I went over and told Mr. Hair he was wanted on the telephone.

Q. Was there a telephone in the cottage in which Mr. Hair was staying? A. No sir.

Q. Where was the telephone? [397]

A. The telephone was in the service station.

Q. With reference to that service station, is that where you stayed the most of the time?

A. Yes, sir, I stayed in the service station until I saw a car drive down to the cottages, then I went down there.

Q. When you told Mr. Hair about this telephone call, what did he do?

A. He came right over to the service station.

Q. And where were you when he came to the service station?

A. Well, I was in there for just the first part of it.

Q. Did he answer the telephone?

(Deposition of Durwood Perkins.)

A. He said——

Q. Just a minute. Did he, or didn't he?

A. Yes sir.

Q. All right. Will you relate what you heard?

Mr. Davis: I object to what he heard as incompetent, irrelevant and immaterial.

The Court: He may answer.

Mr. Smith: You haven't finished the question.

Q. When Mr. Hair answered the telephone will you state whether or not you heard him make any remarks over the telephone? A. I did, yes sir.

Q. Now, will you,—who else was present there besides you and Mr. Hair, if anyone? [398]

A. No one, to my knowledge. Once in a while there are a few people standing around in there, but——

Q. Now, will you state what you heard Mr. Hair say over the telephone?

Mr. Davis: Now, I want to have my same objection to this question, also that it is hearsay.

The Court: He may answer.

A. Answer?

Q. Yes, go ahead.

A. He said,—all I heard him say was, "Hello Avenell, how are you?" That is all I heard him say.

Q. Where did you go,—did you hear any more of the conversation?

A. No, I didn't. I had to leave. I was fixing a tire or something out in the grease room, and I walked out of the station.

(Deposition of Durwood Perkins.)

Q. State if you know the occasion of an accident in which Mr. Hair was involved right about that time, or the next day.

A. I don't understand just what you want.

Q. Well, did you know of an accident in which Mr. Hair was involved?

A. Yes sir.

Q. About that time, or the next day?

A. The next day, yes sir.

Q. The next day did you see Mr. Hair?

A. Yes sir. [399]

Q. Where?

A. He came into the station that evening after the accident. It was between ten and eleven o'clock in the evening.

Q. Between ten and eleven in the evening?

A. It was around there. I didn't pay much attention to the time.

Q. Did he make any remark to you?

A. Yes sir.

Q. When he came into the station between ten and eleven o'clock that evening, did he make any remark to you concerning any telephone calls he might receive?

Mr. Smith: And supplementing the question.

A. And in such remarks did he give you or suggest to you, any directions in case any telephone calls should come in?

Mr. Smith: Now you can answer.

A. Answer?

Q. Yes.

(Deposition of Durwood Perkins.)

Q. Well, he was expecting a phone call from Pocatello,—he come in and told me he was expecting a phone call, and told me to come and tell him, but to be diplomatic about it. That is just what he said.

Q. At that time did you know there had been an accident in which Mr. Hair and Mrs. Avenell Newby were involved?

Mr. Smith: I will withdraw the question because it has already been answered. [400]

Q. When did you first know there had been an accident in which Mr. Hair and Avenell Newby were involved?

A. I did know there had been an accident. Mr. Hair told me himself he had rolled his truck over; I didn't know at the time Avenell Newby was with him, but he told me himself he rolled his truck over.

Q. Is that the only way you knew it, that he told you? A. That is the only way I knew it.

Q. With reference to this conversation Mr. Hair had with you where he told you he rolled his truck over, was that the day before or the day after the time when he had this telephone conversation where you heard him remark something about, "Avenell is this you"?

A. It was the day after the conversation.

Mr. Merrill: That is all.

Mr. Davis: That is all.

Mr. Black: I think that is all we have.

Mr. Merrill: We rest at this time.

Mr. Davis: We have nothing further except that

there are a couple of matters I want to call to the Court's attention and I want to make a motion.

The Court: I will excuse the jury subject to the call of the Bailiff.

Mr. Davis: Now, if the Court please, in view of the testimony of Mr. Donnelly that he went [401] over the territory, and made the territory of the salesmen once a month; that he went in where the salesmen were. In view of this positive testimony that from April 1939 he had full authority to discharge Mr. Hair for any violation of the instructions of the Company, and because of the local significance attached to the case, and of Donnelly's duty to know of Mr. Hair's actions in the territory, I move that the testimony of Sheriff Close be reinstated and Considered by the jury; that it be considered by the jury for what it is worth.

The Court: The motion will be denied.

Mr. Davis: I want to call the Court's attention to the fact that the Sheriff testified that he was acquainted with Mr. Hair the defendant and that he was the same man as B. R. Hair mentioned in the exhibit.

The Court: That exhibit has been admitted. Counsel for the defendants here admitted, or the defendant admitted that defendant Hair was the same identical person.

Mr. Davis: We rest, we have no rebuttal.

Mr. Merrill: Come now the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly, the evidence having been closed and move the Court for [402] a directed verdict, in that it direct the

jury to return a verdict in favor of the said Reynolds Tobacco Company and L. R. Donnelly upon the following grounds to-wit:

That the evidence is wholly insufficient to support any verdict against either of said defendants because said evidence shows without any substantial or any dispute that at the time of the accident and for approximately 18 hours theretofore that the said Rulon D. Hair was not acting as the agent of said defendants or either of them, and was not within the scope of his employment, nor doing anything in the furtherance of his master's business but was entirely upon a pleasure party of his own, and that at the time of said accident he was transporting the deceased Avenell Newby with him and had been during this said 18 hours, from Grace, Idaho, to Montpelier, Idaho, to take her to her home. That the evidence conclusively shows that Avenell Newby was riding in said automobile owned by the R. J. Reynolds Tobacco Company as the guest of Rulon D. Hair, and that said Rulon D. Hair had no authority of any kind or character, from either L. R. Donnelly or the R. J. Reynolds Tobacco Company to haul guests in said car, but had positive written and oral instructions that under no circumstances was he permitted to haul a guest in said car, and that no one should be transported by him other than an employee or officer of the Company, [403] and that this automobile involved in this accident was used without violation of said instructions so far as the company or Donnelly knew, and that there

had been no violation of these instructions in so far as Donnelly or the Company knew at any time since the one incident on the 15th day of April 1939, and that his re-employment at that time was on condition and under the arrangement that he would positively obey such instructions, and that he never thereafter and prior to the 11th day of September 1942 violated such instructions to the knowledge of either of these defendants. That the evidence fails to show that at the time of the accident that Rulon D. Hair was in anywise guilty of violating the guest statute of the State of Idaho, or that he was guilty of reckless disregard of the rights of Avenell Newby, or of any violation of any other of the requirements stated in said statute providing for recovery of the guest suffering damage and that he was not guilty of any negligence at said time and place; that the evidence completely fails to show that the defendant Hair was a careless, reckless and incompetent driver or that he was habitually negligent, and that one accident in Pocatello in 1939 is wholly and completely insufficient, as a matter of law, to establish the status of incompetency on the part of the driver of carelessness or recklessness.

That the incident referred to in plain- [404] tiff's exhibit 22 was unknown to the defendants L. R. Donnelly or the R. J. Reynolds Tobacco Company, or either of them and there is no evidence proving or tending to prove that they had any occasion to know or be informed of said incident, and that the evidence as a whole, in the particulars aforesaid as well as in other particulars fails to show either that

Hair was engaged in the business of these defendants at the time of the said accident or that he was a careless and reckless driver, but that on the contrary, the evidence conclusively shows that he was not engaged, at the time, in furthering the business of said defendants or either of them but was outside the scope of his employment and that the evidence wholly and completely fails to show that he was careless, reckless and incompetent driver, or that the same was known to said defendants or either of them. That in each and all of said particulars the evidence is insufficient to support a verdict against either of said defendants.

Mr. Black: Comes now the defendant Rulon D. Hair and moves the Court that he direct a verdict in favor of this defendant on the following grounds:

That this defendant adopts the motion for a directed verdict heretofore made by counsel for the other defendants as far as it is applicable, and [405] further sets forth the following grounds; That at the time of the said accident and immediately preceding the same the said Avenell Newby was in the company of the said defendant as his guest at her request and her instance and with her acquiescence, and that she joined with him in all acts he performed prior to the accident during this trip and was present during the time just preceding the accident and was in a position to be as observant of all surrounding conditions just preceding the accident and of all acts and omissions on the part of Hair as the defendant Hair was himself; that she was conscious; that she could so observe all of the acts of the defendant

in the operation of the motor vehicle; that she made no protest or objections of any acts of his, regarding the operation of the said automobile, but acquiesced in his conduct and the operation of the automobile as well as other acts or omissions at said time; that she was a gratuitous guest.

That the evidence as a whole is insufficient to sustain the allegation that said Rulon D. Hair had a reckless disregard of the rights of others and of Avenell Newby and so recklessly drove and operated the said Panel truck referred to so that the same ran off the said highway and tipped over, and the evidence is clear that the accident was purely accidental and one [406] caused by the acts of a driver of an on-coming semi-trailer, and the conditions of the weather and the road and the blowing out of a tire, all of which were out of the control of this defendant.

Mr. Merrill: We adopt so much of the motion of counsel as is not included in our own.

The Court: I will take the matter under advisement at this time. I think we will recess until 10 o'clock tomorrow morning. (Admonition to the jury)

10 o'clock A. M. October 23, 1943

The Court: The motion I took under advisement last evening will be overruled.

Mr. Merrill: May we have an exception.

Mr. Black: And we would like an exception.

The Court: Certainly, exception granted.

(Argument of Counsel)

INSTRUCTIONS OF THE COURT.

The Court: Ladies and Gentlemen of the jury: You have listened intently to the evidence and the argument of counsel in this case, and if I may have your attention for a short time I will advise you as to the principles of law applicable in this matter, by which you must be guided in your deliberations. It [407] is your duty to accept these instructions as correct, and so far as the law in the case is concerned to be guided by the Court's instructions. The law provides an ample and adequate remedy whereby any mistakes in the instructions may be corrected but it is not the province of the jury to undertake to correct the mistakes of law which the Court may make, and for the purpose of your deliberations the instructions must be accepted as the law of the case.

The issues in this case are made up by the complaint of the plaintiffs and the answers of the defendants. These issues have been explained to you quite fully by counsel for the respective parties during the trial and during the arguments made to you, and as you will be permitted to take the pleadings to the jury room with you, I do not think it necessary to say anything further to you in regard to them, except that you may refer to them for any assistance they may be to you during your deliberations. I will also say that you must not consider them as evidence in any sense, they are merely to advise you of the claims made by the respective parties.

In passing upon the issues in this case the burden is upon him who asserts the existence of a fact to

establish it, and in civil actions of this character to establish it by a preponderance of the evidence. The burden therefore is upon the plaintiff in the first instance [408] to show by a preponderance of the evidence the cause of action set forth in his complaint, and in determining the credibility to be given to the testimony of any witness you have the right to take into consideration his interest, if any, in the result of the case, his demeanor on the witness stand, his candor or lack of candor, and all other facts and circumstances which would influence you in determining whether or not a witness had told the truth. Preponderance of the evidence does not necessarily mean the greater number of witnesses. It means the greater weight of the testimony or evidence before you taken as a whole. This is the meaning of preponderance as accepted in the law.

It is your duty, ladies and gentlemen, to follow these instructions in good faith, and to try to apply them to the evidence fairly and impartially, entirely apart from any considerations except the facts in the case, and conscientiously and impartially render a verdict. The fact that one party is a corporation and the other a natural person you must disregard, for both are equal before the law.

You are the sole judges of the facts and you must determine what the facts are from the evidence which has been introduced and from the circumstances which have been introduced and from the circumstances which have been detailed by the witnesses. That being your responsibility, it is also your right and duty to determine and to pass upon [409] the credibility of the witnesses and the weight to be

given to their testimony. You will consider the interest which the witnesses have in the result of the trial, and all other facts and circumstances which in common experience of life you have learned, bear upon human testimony and tend to make it truthful and reliable, or upon the other hand, tend to distort or color it.

You are instructed that the defendants do not appear and defend jointly in this action but that R. J. Reynolds Tobacco Company and L. R. Donnelly defend the action separately by separate counsel. Their respective defenses are alike in some respects but are entirely different in other respects. If you find for the defendant Rulon D. Hair, you cannot under any circumstances find against the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly. On the other hand, if you believe that Hair was a careless, reckless, incompetent driver, and that the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly knew, or by the use of reasonable diligence could have known that he was a careless, reckless and incompetent driver, or, that he was acting as the agent, servant and employee of the R. J. Reynolds Tobacco Company or L. R. Donnelly, within the course and scope of his employment as these terms are defined for you in these instructions, then you would be justified in finding against the defendant R. J. Reynolds Tobacco Company and [410] L. R. Donnelly.

You are instructed that one driving an automobile owned by another is presumed to be the agent of the owner of said automobile.

You are instructed that Section 48-908, Idaho Code Annotated as amended by Chapter 160 of the Idaho Session Law of 1939 provides as follows: "Liability of Motor Owner to Guest. No person transported by the owner or operator of a motor vehicle as his guest without payment for such transportation shall have a cause for damages against such owner or operator for injuries, death or loss in case of accident, unless such accident shall have been intentional on the part of the said owner or operator or caused by his intoxication or his reckless disregard of the rights of others."

In this case it is alleged by the plaintiffs and admitted by the defendants that Avenell Newby was riding in the automobile being driven by Rulon D. Hair as a gratuitous guest and accordingly, the statute quoted to you has full application to the facts in this case.

You are instructed that the plaintiffs have alleged and the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly, were negligent in permitting Rulon D. Hair to use said automobile knowing him to be a reckless [411] and incompetent driver. Before you can consider this charge against the said R. J. Reynolds Tobacco Company and L. R. Donnelly, it would be necessary for you to find from a preponderance of the evidence, first; that Rulon D. Hair was a careless, reckless and incompetent driver; and, secondly; that such facts were known to the R. J. Reynolds Tobacco Company and L. R. Donnelly, and before such matter can be considered by you it would be necessary for you to find that

a reasonably prudent man, knowing the facts as shown by the evidence would reasonably conclude that he was of such character. In order that prior specific acts of negligence by a servant, agent or employee should be sufficient to establish the master's negligence in retaining the servant in his employ, the action must be the result of such incompetence of such a character rendering the servant unfit to be retained in his position, and even though you find by a preponderance of the evidence that Rulon D. Hair was a careless, reckless and incompetent driver, yet, if such was not known or by reasonable diligence could have been known to R. J. Reynolds Tobacco Company and L. R. Donnelly, they could not, nor either of them, be held negligent in employing Rulon D. Hair, or keeping him in their employment.

You are instructed, that while some evidence has been admitted as to defendant Rulon D. Hair having permitted other people to ride in his truck at various times, [412] and as to a former accident in which defendant Rulon D. Hair was involved with a similar truck in Pocatello, Idaho, in the Spring of 1939, in which one Myers was involved, and also evidence pertaining to the arrest and plea of guilty of defendant Rulon D. Hair at Dubois, Idaho, in 1939, for an alleged violation of a traffic law, you are instructed that you cannot consider any of said evidence received on either of said incidents as any evidence whatever supporting the charge against defendant Rulon D. Hair, in this action. This evidence was admitted as to defen-

dant R. J. Reynolds Tobacco Company and L. R. Donnelly, as to their responsibility as covered in other instructions.

The Statute of Idaho makes it unlawful for any person to drive any vehicle upon a highway carelessly and heedlessly in wilful or wanton disregard of the rights or safety of others, or without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger **any person or property**, and it is further provided in the State statute that any person driving a vehicle on a highway shall drive the same at a careful and prudent speed not greater than is reasonable and proper, having due regard to the traffic, surface and width of the highway and of any other condition then existing, and no person shall drive any vehicle upon a highway at such a speed as to endanger the life, limb or property of any person, and in that Statute it is provided that it shall be *prima facie* lawful for a [413] driver of a vehicle to drive the same on a highway at a speed not exceeding thirty-five miles an hour, and it is further provided in the State Statute that it shall be *prima facie* unlawful for any person to exceed the speed of thirty-five miles an hour on a highway outside of municipalities.

You are instructed that a servant may be presumed *prima facie* to be acting in the course of his employment, wherever it appears, not only that his master was the owner of the given instrumentality, but also that, at the time when the alleged

injury occurred, it was being used under conditions which normally attended those used in connection with the master's business.

You are instructed that if you should find from the evidence that the said Rulon D. Hair had previously to the 11th day of September 1942, disobeyed the instructions of his employer or employers and had permitted guests to ride with him in the truck or trucks furnished him by the R. J. Reynolds Tobacco Company for the purpose of selling their products and that such fact or facts were known to the R. J. Reynolds Tobacco Company or any of its authorized agents or if by the use of ordinary diligence and precaution such facts could have been known to the said R. J. Reynolds Tobacco Company or any of its agents, then the said defendants in this case could not avail themselves of the defense that [414] the said Rulon D. Hair was acting contrary to instructions and outside the scope of his authority in hauling a guest, or in not attending to company business.

You are instructed that as it is conceded by the R. J. Reynolds Tobacco Company, that the deceased Avenell Newby was riding in the panel truck of said Tobacco Company as a gratuitous passenger or guest of Hair, then the defendants are liable if the accident resulting in the death of Avenell Newby shall have been caused by the operator through his intoxication or his reckless disregard of the rights of others and if you find from a preponderance of the evidence that anyone of these things was the proximate cause of the death of Avenell Newby, then

your verdict should be for the plaintiffs if you find for the plaintiffs upon the other issues.

You are instructed that it has been admitted that L. R. Donnelly was the division manager of the defendant R. J. Reynolds Tobacco Company and that Rulon D. Hair was under the direction and supervision of L. R. Donnelly as division manager, and you are instructed that any notice to L. R. Donnelly or any facts that came to his attention would constitute notice to R. J. Reynolds Tobacco Company, defendant herein, as he was their duly authorized division manager and agent.

Now, if you find in favor of the plain- [415] tiffs and come to consider the damages which you will award there is no precise measure or guide. The question is necessarily committed to the good sense of twelve persons such as you are, acting as jurors. Any damage allowed should be such, as under all the circumstances of the case, will be just. In considering the amount however, you may take into consideration the age and condition of the deceased Avenell Newby. The evidence discloses that she was 28 years of age, and a person of that age, according to the American Experience Table of Mortality, has an expectancy of 36.73 years more of life, assuming she was in good health. You are permitted to take into consideration such loss of companionship and society, if any, which the plaintiffs might have enjoyed. You may also consider such future earnings of the deceased, if any, which might have been received by the plaintiffs. You may also

consider the amount that the plaintiffs have necessarily paid out or incurred by reason of the expense of physicians, hospital and funeral expenses. You are to consider this question as you consider other questions in the case, dispassionately and fairly, with the purpose in good faith to award such reasonable damages as the plaintiffs have suffered. The amount of damages, if any, which you allow shall in no event exceed the amount prayed for in the plaintiffs' complaint.

You are instructed that an employer [416] in selecting an employee, must exercise a degree of care commensurate with the nature and danger of the business in which the employee is engaged.

You are instructed that it is alleged by the plaintiffs that the defendants, Donnelly and Reynolds Tobacco Company intrusted the panel truck to Hair, knowing that Hair was careless, reckless and incompetent, and you are instructed that if you find said allegations to have been proven and if you are satisfied by a preponderance of the evidence that said Rulon D. Hair was a careless, reckless and incompetent driver and that such fact was known by his employer or employers and the owner of said truck, that his employer and the owner of said panel truck would be liable for the acts of said Hair, in reckless disregard of the rights of others, regardless of whether he was acting within the scope of his authority or on his master's or employer's business.

You are instructed that it is conceded that the panel truck belonged to the R. J. Reynolds Tobacco Company and the facts show that the accident oc-

curred during ordinary business hours; that the accident also occurred in the territory or locality in which the said Rulon D. Hair was authorized to operate as a salesman for R. J. Reynolds Tobacco Company products and that the said panel truck [417] belonging to the R. J. Reynolds Tobacco Company and driven by Rulon D. Hair at the time of the accident contained property and products of the R. J. Reynolds Tobacco Company, ordinarily carried for sale by the said Rulon D. Hair in said Panel truck and you are instructed that you may take into consideration these facts and circumstances to assist you in determining whether or not the said Rulon D. Hair was at the time of the accident acting within the scope of his employment.

In this case it is contended that Rulon D. Hair drove and operated the automobile with reckless disregard to the rights of Avenell Newby. The phrase or term, "Reckless disregard" as used in the guest statute quoted to you means an act destitute of heed or concern for consequences; especially foolishly heedless of danger, headlong, rash; without thought or care for consequences.

The depositions read to you in this case are the testimony of witnesses who were unable to attend the trial of this case, and were taken in the manner provided by law and under oath, the testimony of such witnesses as contained in such depositions is entitled to the same consideration and weight as though the witness was present in person and testifying orally in the Court room.

You have already been advised or will [418] observe that this action is one on behalf of George H. Newby, the husband of Avenell Newby, deceased, in his own behalf, and also on behalf of Richard Arlen Newby and Patty Ann Newby, both minors, and children of the deceased, Avenell Newby, who are represented by their guardian ad litem, their father, George H. Newby, and you are instructed that if you find that the plaintiffs are entitled to damages, and if you return a verdict in favor of the plaintiffs, that your verdict should be in a lump sum and that any amount, if allowed, will be apportioned to the father and the minors by the Court in such manner or such amounts as to the Court seems proper.

The instructions you have already heard have been expressed in what may be for the layman rather formal legal language. However, they are not intended to be mysterious. You have the same tools to work with in arriving at your verdict as a Judge of this Court would have if a jury had been waived. Those tools of yours, like his, are your judgment, your memory and recollection, your experience, your common sense and your conscience.

You are not bound by the testimony of any witness as to any matter except as such appeals to your judgment and common sense and you are entitled to view it and to interpret it in the light of your experience, good judgment and common sense. [419]

I think I should tell you also, that you should not single out any particular statement I may have made in giving you these instructions, but they

should be considered as a whole,—as an entire charge.

You have heard the witnesses, seen the exhibits, listened to the arguments of counsel and the instructions of the Court; you may take with you, when you retire, the exhibits which have been admitted and you may refer to them for such assistance as they may give. You should not consider any evidence offered by either side and rejected by the Court, nor should you consider any evidence ordered stricken from the record.

Finally I will say that you are not permitted, in arriving at a verdict, to add together different amounts representing the respective views of the different jurors and then divide the total by twelve or by some other figure intended to represent the number of jurors, or ideas represented. Such would be a quotient verdict and would be contrary to law and contrary to your oath. You are, of course, to give serious consideration to each other's views and reasoning, in an honest endeavor to reach a common agreement, but such agreement is to be based upon the final beliefs of the jurors and must not be arrived at by that mechanical device of addition and division which constitutes a quotient verdict. [420]

In this Court it is necessary that all jurors concur in finding a verdict, even in a civil case of this character. Forms of verdict have been prepared for you and you will have no difficulty in using them. If you find for the plaintiffs and against the defendants Rulon D. Hair; R. J. Reynolds Tobacco Company and L. R. Donnelly you will use the verdict

prepared for that purpose filling in the blank space left in the verdict to indicate the amount of damages you find the plaintiffs are entitled to. If you find for the plaintiffs and against the defendants Rulon D. Hair and L. R. Donnelly, you will use the verdict prepared for that purpose filling in the blank space left in the verdict to indicate the amount of damages you find the plaintiffs are entitled to, in this event, you will also use the verdict in favor of the defendant Reynolds Tobacco Company. If you find for the plaintiffs and against the defendant Rulon D. Hair, you will use the verdict prepared for that purpose filling in the blank space left in the verdict to indicate the amount of damages you find the plaintiffs are entitled to, in this event, you will also use the verdict in favor of the defendants Reynolds Tobacco Company and L. R. Donnelly. If you find for the defendants and against the plaintiffs you will use the verdict prepared for that purpose in which there is no blank space.

When you retire to your jury room you [421] will elect a foreman, when you have arrived at a verdict your foreman alone need sign the same and you will return it into open Court.

The Bailiff will be sworn and you will retire with the Bailiff.

The Court: It will be necessary for you ladies and gentlemen of the jury to retire from the Court room for a few minutes because of legal procedure, and you will be with the Bailiff and you will return with him at the direction of the Court.

Mr. Merrill: Comes now the defendant R. J.

Reynolds Tobacco Company and also defendant L. R. Donnelly, before the jury has retired and objects and excepts to the instructions given to the jury by the Court and also to the failure of the Court to give the requested instructions of the defendants not given by the Court more particularly as follows:

The defendants object to that certain instruction given to the Jury reading as follows: "You are instructed, that while some evidence has been admitted as to the defendant Rulon D. Hair, having permitted other people to ride in his truck at various times, and as to a former accident in which defendant Rulon D. Hair was involved with a similar truck in Pocatello, Idaho, in the Spring of 1939, in which one Myers was involved, and also evidence pertaining to the arrest and plea of guilty of defendant [422] Rulon D. Hair, at Dubois, Idaho, in 1939, for an alleged violation of a traffic law, you are instructed that you cannot consider any of said evidence received on either of said incidents as any evidence whatever supporting the charge against defendant Rulon D. Hair, in this action. This evidence was admitted as to defendants R. J. Reynolds Tobacco Company and L. R. Donnelly, as to their responsibility as covered in other instructions."

The defendants object and except to that certain instruction given to the jury reading as follows: The Statute of Idaho makes it unlawful for any person to drive any vehicle upon a highway care-

lessly and heedlessly in wilful or wanton disregard of the rights or safety of others, or without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property, and it is further provided in the State Statute that any person driving a vehicle on a highway shall drive the same at a careful and prudent speed not greater than is reasonable and proper, having due regard to the traffic, surface and width of the highway and of any other conditions then existing, and no person shall drive any vehicle upon a highway at such a speed as to endanger the life, limb or property of any person and in that statute it is provided that it shall be *prima facie* lawful for a driver of a vehicle to drive the same on a highway at a speed not exceeding thirty-five miles an hour, and it is further provided in the State Statute that it shall [423] be *prima facie* unlawful for any person to exceed the speed of thirty-five miles an hour on a highway outside of municipalities." This is objected to particularly on the ground this would apply to cases of ordinary negligence in which automobiles are involved and that it does not have application in the instant case, or in any case where the guest statute is involved and that the said instruction would tend to confuse and mislead the jury into considering the law applicable to ordinary negligence rather than cases under the guest statute.

Mr. Black: Defendant Hair excepts to the giving of this instruction on the same grounds.

Mr. Merrill: The said defendant Tobacco Company and Donnelly objects and excepts to the giving of the instruction to the jury reading as follows: "You are instructed that a servant may be presumed prima facie to be acting in the Course of his employment, wherever it appears, not only that his master was the owner of the given instrumentality, but also that, at the time when the alleged injury occurred, it was being used under conditions which normally attended those used in connection with the master's business." Upon the ground that such instruction overlooks the fundamental facts in this case and also overlooks the facts that such presumption may be rebutted by evidence indicating or showing that the servant was using said instrumentality for his own purpose or in a way [424] not within the scope of his employment or in the advancement of his master's business.

Mr. Black: We desire to adopt the same objection to that instruction.

Mr. Merrill: The said defendants further object and except to the giving of the instruction reading as follows: "You are instructed that if you should find from the evidence that the said Rulon D. Hair had previously to the 11th day of September 1942, disobeyed the instructions of his employer or employers and had permitted guests to ride with him in the truck or trucks furnished him by the R. J. Reynolds Tobacco Company for the purpose of selling their products and that such fact or facts were known to the R. J. Reynolds Tobacco Company or any of its authorized agents or if by the

use of ordinary diligence and precaution such facts could have been known to the said R. J. Reynolds Tobacco Company or any of its agents, then the said defendants in this case could not avail themselves of the defense that the said Rulon D. Hair was acting contrary to instructions and outside the scope of his authority in hauling a guest, or in not attending to company business." Upon the ground that the instruction is too limited as to the matter therein involved, particularly in that such could not be the basis of the law in this case unless it [425] should be broad enough to show that the disregard of said instructions of the Company had become *no* notorious as to form a habit, and that an occasional disregard, if any existed, could not be regarded as a waiver of said fundamental rule.

The said defendants object and except to the giving of the instruction reading as follows: "You are instructed that as it is conceded by the R. J. Reynolds Tobacco Company, that the deceased Avenell Newby was riding in the panel truck of said Tobacco Company as a gratuitous passenger or guest of Hair, then the defendants are liable if the accident resulting in the death of Avenell Newby shall have been caused by the operator through his intoxication or his reckless disregard of the rights of others and if you find from a preponderance of the evidence that any one of these things was the proximate cause of the death of Avenell Newby, then your verdict should be for the plaintiffs, if you find for the plaintiffs upon the other issues." Particularly because said instruction does not distinguish

between the rights of the said Hair and the rights of the Reynolds Tobacco Company and Donnelly, but advises the jury in effect that if they should find that Avenell Newby was a guest of Hair's then their verdict should be against the defendants.

Mr. Black: Defendant Hair joins in the objection and exception to that instruction [426]

Mr. Merrill: The said defendants further object and except to the instruction given to the jury and reading as follows: "You are instructed that it has been admitted that L. R. Donnelly was the division manager of the defendant, R. J. Reynolds Tobacco Company, and that Rulon D. Hair was under the direction and supervision of L. R. Donnelly as division manager, and you are instructed that any notice to L. R. Donnelly or any facts that came to his attention would constitute notice to R. J. Reynolds Tobacco Company, defendant herein as he was their duly authorized division manager and agent." Particularly for the reason that there is no evidence showing or tending to show the scope of the authority of said L. R. Donnelly, or that such authority was so broad as to cover matters referred to in said instruction.

Mr. Black: Defendant Hair joins in the objection and exception to that instruction.

Mr. Merrill: The said defendants further object and except to the giving of that portion of the instruction relating to damages reading as follows: "The evidence discloses that she was 28 years of age, and a person of that age, according to the American Experience Table of Mortality, has an expectancy

of 36.73 years more of life, assuming she was in good health." Particularly upon the ground that it is a recitation to the jury of the evidence in the case and not a statement of the law. [427]

The said defendants object and except to the giving of the instruction reading as follows: "You are instructed that it is conceded that the panel truck belonged to the R. J. Reynolds Tobacco Company and the facts show that the accident occurred during ordinary business hours; that the accident also occurred in the territory or locality in which the said Rulon G. Hair was authorized to operate as a salesman for R. J. Reynolds Tobacco Company and driven by Rulon D. Hair at the time of the accident contained property and products of the R. J. Reynolds Tobacco Company, ordinarily carried for sale by the said Rulon D. Hair in said Panel Truck and you are instructed that you may take into consideration these facts and circumstances to assist you in determining whether or not the said Rulon D. Hair was at the time of the accident acting within the scope of his employment." For the reason that the said instruction overlooks the fact and disregards the fact that Hair may have departed from the scope of his employment and engaged in a matter entirely his own and that he was disregarding the instruction of the company in the hauling of guests in said car.

Mr. Merrill: As to the first instruction objected to, regarding the evidence admitted as to the accident in Pocatello in the spring of 1939 and the in-

eident in Dubois, Idaho. The said defendant object to that particularly for the reason that under the facts in this case and [428] the allegations of the complaint, the said defendants R. J. Reynolds Tobacco Company and L. R. Donnelly could not be liable in any respect for either of the acts recited in said instruction and charged to have been committed by the said defendant Hair, and that the same were wholly and completely insufficient to constitute any habit of negligence and particularly that the instruction having to do with the plea of guilty of Hair at Dubois, Idaho in 1939 is improper in that the evidence does not show in any circumstance that the said defendants Tobacco Company and Donnelly had any knowledge or had any reason to know of the said arrest or plea of guilty or any matter connected with the said incident.

The Court: Do you have any exceptions or objections Mr. Davis?

Mr. Davis: None, if the Court Please.

(Whereupon the jury returned to the Court room)

The Court: Ladies and Gentlemen of the jury, you will disregard that portion of the Court instructions where I told you that the evidence discloses that she, meaning Avenell Newby, was 28 years of age, and a person of that age, according to the American Experience Table Of Mortality, has an expectancy of 36.73 years more of life, assuming she was in good health. You will disregard that part of the instructions.

Mr. Merrill: Now, the Defendants [429] R. J.

Reynolds Tobacco Company and L. R. Donnelly, further object and take exceptions to the failure of the Court to give those certain instructions requested by the said defendants, more particularly as follows: Defendants' requested instruction number 5, reading as follows: "You are instructed that a high rate of speed or even excessive speed in the driving of an automobile is not in and of itself reckless disregard of the rights of a guest riding in said car with said driver." For the reason that the rate of speed or even excessive speed in driving an automobile is not in and of itself an element of reckless disregard of the rights of a guest riding in the said car.

Excepts to the failure to give defendants' requested instruction number 6, reading as follows: "You are instructed that if you believe from a preponderance of the evidence that Rulon D. Hair was forbidden by the R. J. Reynolds Tobacco Company to permit anyone to ride in said car as his guest and if you find this instruction was in full force and effect on the 11th day of September, 1942, but that notwithstanding said instruction he hauled Avenell Newby in his car as a guest, you must then find that he was not acting within the scope of his employment and that any injury, if any, that might have occurred to Avenell Newby as said guest, could not have been charged against the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly and no judgment could be rendered against these defendants." [430] For the reason that there was evidence introduced from which the jury could con-

clude that the instruction, from the Company to Rulon D. Hair, not to carry or haul guests in said car was in full force and effect and that a violation thereof would be outside the scope of his employment.

Except to the failure to give defendants' requested instruction number 7 reading as follows: "You are instructed that there is a presumption that the driver of an automobile is the owner's agent, but this presumption is rebuttable. Thus, if you should find in this case, that the said Rulon D. Hair, at the time of the said accident was using an automobile which was owned by R. J. Reynolds Tobacco Company and L. R. Donnelly, but that the use thereof was not in the furtherance of the business of either of said defendants, but was being used by the said Rulon D. Hair for his own personal business or pleasure, then and in that event the said R. J. Reynolds Tobacco Company and the said L. R. Donnelly would not be liable for any damage caused by the use of said automobile by the said Rulon D. Hair." Particularly because there is evidence in the record clearly indicating and tending to prove that the said Rulon D. Hair was not, at the time of said accident, using said automobile in the furtherance of the business of these defendants or either of them, but on his personal pleasure and outside the scope of his employment.

Defendants except to the failure to [431] give defendants' requested instruction number 8, reading as follows: "You are instructed that before the

owner of the automobile or the employer of the driver can be held liable for the actions of the driver you must find that the driver was the agent, servant or employee of said owner or employer and acting at the time of said accident in the furtherance of the said employers business and unless you so find you cannot find against said employer or the owner of said automobile. Even if you should find that at the time of said accident the said Rulon D. Hair was in the employ of the said R. J. Reynolds Tobacco Company or L. R. Donnelly, but that he was using said automobile for his own business or pleasure and not for the furtherance of the business of said company or the said L. R. Donnelly, then, in that event you cannot find against said defendants R. J. Reynolds Tobacco Company or L. R. Donnelly." For the reason that said instruction states the law of the case applicable to the parties involved in this action, and that if the said Hair was using the said car for his own purpose and outside of the scope of his employment, said employers would not be liable.

Defendants further except to the failure of the Court to give requested instruction number 9, reading as follows: "You are further instructed that if you believe from a preponderance of the evidence that on the 11th day of September 1942, Rulon D. Hair was traveling along the [432] highway toward Montpelier, Idaho, with the prime objective of taking Avenell Newby to her home in Montpelier, and that while so driving he was not upon the business of his employer, then and in that event neither

the said R. J. Reynolds Tobacco Company nor L. R. Donnelly can be held liable for any damages that might have occurred on said trip even though the said Hair was driving the truck of the said Reynolds Tobacco Company, which may have contained property belonging to said Tobacco Company." For the reason that the testimony is that the said Hair was at the time of said accident transporting Avenell Newby to her home in Montpelier, Idaho, and that fact, if it be a fact, that said truck contained products of the Reynolds Tobacco Company would not, under the said testimony, render the other testimony as to the use of said car by said Hair for his personal pleasure and business and not within the employment of the Company, valueless, but that said instruction should have been given in the light of the evidence in this case.

Defendants further except to the failure to give requested instruction number 10, reading as follows: "You are further instructed that if you believe from a preponderance of the evidence that the said Rulon D. Hair was transporting Avenell Newby in said truck along said highway at the time of said accident, with the prime objective of taking her to her home in Montpelier, the mere fact that he intended to later pick up his personal effects at the [433] cabin camp could not be considered by you as in any manner engaging in the business of his employer, and if his prime objective was to first take her home, then and in that event it would be a matter of his own personal busi-

ness or pleasure and he could not be held to have been acting within the scope of his employment and his employers could not be held liable." For the same reasons assigned to the failure to give requested instruction number 9.

Defendants except to the failure of the Court to give requested instruction number 12, reading as follows: "You are instructed that if you believe from a preponderance of the evidence that Rulon D. Hair had been drinking intoxicating liquor and that the said Avenell Newby joined with him and also drank intoxicating liquor, and that the two of them were riding in said automobile while under the influence of such intoxicating liquor, then and in that event you are instructed that the said Avenell Newby assumed the risk of any danger or damage that might result from the use of intoxicating liquor and was contributorily negligent in her conduct, and under such circumstances the the plaintiffs cannot recover in this case." For the reason that the law of Idaho is to the effect that if a guest participates and joins with the driver of an automobile in imbibing intoxicating liquor, the guest is equally liable with the driver and is contributorily negligent and assumes the risk of riding in said automobile. [434]

Defendants except to the failure of the Court to give requested instruction number 14, reading as follows: "You are instructed that a gratuitous guest or his heirs or legal representatives cannot recover for a host's negligent operation of an automobile if, conscious of apparent danger or faced

with such conditions and circumstances as would herald danger to a reasonably prudent man, he fails opportunely to protest or acquiesces therein, and in this case, if you believe from the evidence that Avenell Newby, acting as a reasonably prudent person, should have known that Rulon D. Hair was driving said automobile in a reckless disregard of the rights of others, or that he was intoxicated, and nevertheless continued to ride with him under such conditions, or failed to give timely warning to him, then you are instructed that her failure to do so would bar a recovery by the plaintiffs, and if you find such circumstances and facts existed, your verdict should be for the defendants." For the reason that under the law and the facts in this case, if said Avenell Newby failed to protest in anything which said Hair may have been doing in the driving of said automobile but acquiesced therein, she would have assumed all risk and could not recover in this case.

Defendants except to the failure to give defendant's requested instruction number 15 reading as follows: "You are instructed that the plaintiffs have [435] alleged that the defendants, R. J. Reynolds Tobacco Company and L. R. Donnelly, were negligent in permitting Rulon D. Hair to use said automobile knowing him to be a reckless and incompetent driver. Before you can consider this charge against the said R. J. Reynolds Tobacco Company and L. R. Donnelly, it would be necessary for you to find from a preponderance of the evidence, first, that Rulon D. Hair was commonly and

ordinarily a careless, reckless and incompetent driver; and, secondly, that such facts were known to the R. J. Reynolds Tobacco Company and L. R. Donnelly. You are further instructed that one incident *or* carelessness or recklessness brought to the attention of R. J. Reynolds Tobacco Company and L. R. Donnelly, does not in and of itself prove that the party so engaged was habitually a careless or reckless driver, but that before such a matter can be considered by you it would be necessary for you to find from a preponderance of the evidence that the said Rulon D. Hair had committed a number of such acts to such an extent that it was a habit with him and that a reasonably prudent man knowing of them and all of them, would reasonably conclude that he was of such character; and unless you find all of these facts to be sustained by a preponderance of the evidence you are instructed to disregard this allegation of the plaintiff's complaint and you cannot consider it in arriving at a verdict." Particularly for the reason that before the theory involved in said instruction and in this case can be [436] made applicable,—strike that—for the reason that one or even two acts of recklessness, carelessness or negligence could not be interpreted as forming a habit *or* negligence and would not render a driver of an automobile as an incompetent driver or habitually reckless and careless.

Defendants except to the failure to give defendants' requested instruction number 16, reading as follows: "You are instructed that ordinary care implies occasional acts of carelessness, for all men

are fallible in this respect, and the law demands only the ordinary. A man perfectly competent in all respects for the duty he undertakes to perform, may occasionally be negligent, so that one or two specific acts of negligence do not prove incompetence. It must either be shown that the so-called negligent acts were the result of incompetence, or were of such character and so constantly committed as to constitute a habit of negligence, rendering the servant unfit to be retained in his position. You cannot find that Rulon D. Hair was incompetent and unfit for the service he was employed to perform with Reynolds Tobacco Company and L. R. Donnelly unless you find from a preponderance of the evidence that his acts of negligence in the operation of an automobile were of such a character and so constantly committed as to constitute a habit of negligence rendering him unfit to be retained in his said employment and, that such a habit of negligence, if such there was, was known to R. J. Reynolds [437] Tobacco Company and L. R. Donnelly. An occasional act of negligence on his part would not constitute a habit of negligence nor render him unfit for the said employment." Particularly for the reason that before the theory involved in this instruction and in this case can be made applicable to the facts herein it would be necessary that the acts asserted to have been committed by the driver be of such character and so constantly committed as to constitute a habit of negligence and that the jury should have been so instructed in this instance.

Defendants except to the failure to give instruc-

tion number 17, reading as follows: "You are further instructed that all of the testimony of Sid Close, Sheriff of Clark County, Idaho, has been, by Order of the Court, stricken from the record, and you are instructed to disregard all of said testimony and give it no consideration in arriving at your verdict." For the reason that said evidence had all been stricken from the record after it had been admitted and that it was prejudicial to the interest of these defendants for the jury not to have been instructed that they should disregard the said testimony of Sid Close, and all of it.

Defendants except to the failure of the Court to give requested instruction number 18, reading as follows: "You are further instructed that one act of negligence if you find that one was committed, by [438] Rulon D. Hair prior to September 11, 1942, and brought to the attention of the R. J. Reynolds Tobacco Company or L. R. Donnelly such fact would be wholly insufficient to charge Hair's said employers or either of them, with negligence, and you must disregard such testimony." Because under the law, it is not possible for the jury to conclude that a driver was incompetent or careless or reckless by reason of having committed one or two previous acts of negligence.

Defendants except to the failure to give their requested instruction number 19, reading as follows: "Even though you find by a preponderance of the evidence that Rulon D. Hair was a careless, reckless and incompetent driver, yet if such was not known to R. J. Reynolds Tobacco Company and L.

R. Donnelly, they could not, nor either of them be held negligent in employing Rulon D. Hair, or keeping him in their employment." For the same reason as assigned to the refusal to give instruction number 18.

Defendants except to the refusal of the Court to give their requested instruction number 21 reading as follows: "You are further instructed that if you should find under a preponderance of the evidence and these instructions that any damages should be awarded against either or any of said defendants, then you are instructed that you should not allow vindictive or punishing damages [439] that are highly speculative, but your award must be based upon actual pecuniary loss measured as nearly as you can in terms of money, that will result to the plaintiffs." For the reason that the jury could not, under the law of this case, consider vindictive or punishing damages that are highly speculative but that they must base any award given upon actual pecuniary loss, and are not to be permitted to allow sympathetic pleas or any attempt to impose punishment upon said defendants or either of them, to enter into the matter.

Defendants except to the failure of the Court to give their requested instruction number 22 reading as follows: "You are instructed that if you should return a verdict for the plaintiffs in this action, the measure of damages will be the pecuniary loss suffered by the plaintiffs as this may be defined to you in other instructions, and you cannot take into consideration any mental or emotional loss or suffering

occasioned by said plaintiffs or any of them by the injury to or death of Avenell Newby." For the same reasons as assigned to the refusal to give instruction number 21.

That for the assigned reasons and for various other reasons having application to this case the instructions given and objected to herein did not state the law covering the trial, and controlling in this case, but tended to confuse and mislead the jury, and [440] that the requested instructions which were not given, state the law applicable to the facts of this case and were necessary for the protection of the rights of these defendants.

The Court: Now, the Bailiffs will be sworn and the jury will retire to consider this matter.

(Verdict in favor of plaintiffs and against defendants in the sum of \$7500.00 returned by Jury.)

Mr. Smith: Defendants R. J. Reynolds Tobacco Company and L. R. Donnelly wish to formally except to the verdict of the jury.

Mr. Black: And the same exception is taken for the defendant Hair. [441]

State of Idaho,
County of Ada—ss.

I G. C. Vaughan hereby certify that I am the reporter who took the testimony and proceedings in the above entitled case in shorthand, and I further certify that I thereafter transcribed the same into longhand and compiled the same in the form of a transcript, and that the foregoing 344 pages, ex-

clusive of this certificate is a true and correct transcript of the testimony given and the proceedings had in and about the trial of the said cause.

In witness whereof I have hereunto set my hand this 9th day of March 1944.

G. C. VAUGHN

[Endorsed]: Filed Mar. 10, 1944. [442]

[Title of Court and Cause.]

STIPULATION AND ORDER TO TRANSMIT
EXHIBITS

It Is Hereby Stipulated and Agreed that, good cause existing therefor, the following exhibits may be forwarded by the Clerk of this Court to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, in lieu of copies thereof and in lieu of having the same printed in the record, the remaining exhibits having been designated in the contents of the record for printing, excepting Exhibit No. 1 which was not introduced, and which exhibits thus stipulated to be transmitted are of such character as to be difficult to print and can best be considered by the appellate court in their original form, being numbered and described as follows:

No. 2. Photograph

No. 3. Drawing or map

No. 4. Photograph

No. 5. Photograph

- No. 6. Photograph
- No. 7. Business card
- No. 8. Report of L. R. Donnelly
- No. 9. Report of Bunderson [452]
- No. 10. Photograph of deceased in frame
- No. 12. Report of R. D. Hair
- No. 13. Corrected report of R. D. Hair
- No. 15. Motor registration receipt, 1939
- No. 16. Motor registration receipt, 1940
- No. 17. Motor registration receipt, 1941
- No. 18. Motor registration receipt, 1942

Dated this 22nd day of January, 1944.

GLENN A. COUGHLIN

Residing at Montpelier, Idaho

B. W. DAVIS

Residing at Pocatello, Idaho

Attorneys for plaintiffs and
appellees

E. B. SMITH

Residing at Boise, Idaho

A. L. MERRILL

R. D. MERRILL

Residing at Pocatello, Idaho

Attorneys for R. J. Reynolds
Tobacco Company and L. R.
Donnelly

ROY L. BLACK

JOHN R. BLACK

Residing at Pocatello, Idaho

Attorneys for Rulon D. Hair

ORDER

It appearing to the Court that the above named defendants by separate appeals have appealed to the United States Circuit Court of Appeals for the Ninth Circuit, and it further appear- [453] ing that there are certain exhibits which would be difficult to print or to make copies thereof and can best be presented to the appellate court in their original form; and said parties having stipulated in the premises,

It Is Hereby Ordered that the foregoing stipulation is hereby approved, and pursuant thereto,

It Is Further Ordered, and this does order, that the exhibits described in said stipulation and hereby referred to for further particulars shall be forwarded by the Clerk of this Court to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, to be by such Court held for inspection and used on appeal so taken by said appellants.

Dated January 24th, 1944.

CHASE A. CLARK

District Judge

[Endorsed]: Filed Jan. 24, 1944. [454]

[Title of Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL BY R. J. REYNOLDS TO-
BACCO COMPANY AND L. R. DONNELLY

Come Now the appellants, R. J. Reynolds Tobacco Company and L. R. Donnelly, two of the above named defendants, and hereby designate the contents of the record, proceedings and evidence to be contained in the record on appeal of the above entitled cause to the Circuit Court of Appeals for the Ninth Circuit, as follows:

1. Complaint.
2. Petition for order appointing guardian ad litem.
3. Order appointing guardian ad litem.
4. Order for removal to the United States District Court for the District of Idaho, Eastern Division.
5. Motion to dismiss and to make more definite and certain, by R. J. Reynolds Tobacco Company and L. R. Donnelly.
6. Motion to dismiss and to make more definite and certain by Rulon D. Hair.
7. Order on motions.
8. Demand for jury trial.
9. Answer of R. J. Reynolds Tobacco Company and L. R. Donnelly.
10. Answer of Rulon D. Hair.
11. Motion to file amended complaint.
12. Objections to filing amended complaint by R. J. Reynolds Tobacco Company and L. R. Donnelly.

13. Objections to filing amended complaint by Rulon D. Hair.

14. Minute entry granting plaintiff permission to file amended complaint.

15. Amended Complaint.

16. Motion to dismiss, motion for more definite statement, and motion to strike, directed to amended complaint, by R. J. Reynolds Tobacco Company and L. R. Donnelly.

17. Motion to dismiss, motion for more definite statement, directed to amended complaint, filed by Rulon D. Hair.

18. Order re motion to dismiss, etc. of R. J. Reynolds Tobacco Company and L. R. Donnelly.

19. Order re motion to dismiss, etc. of Rulon D. Hair.

20. Answer of R. J. Reynolds Tobacco Company and L. R. Donnelly to amended complaint.

21. Answer of defendant Rulon D. Hair to amended complaint.

22. Motion to require plaintiffs to elect, and to strike, filed by R. J. Reynolds Tobacco Company and L. R. Donnelly.

23. Motion to require plaintiffs to elect, and to strike, filed by Rulon D. Hair.

24. Minute entry denying defendants' motions requiring plaintiffs to elect.

25. Minute entry denying motions for instructed verdict and exceptions to instructions to jury.

26. Verdict of jury.

27. Judgment on Verdict.

28. Petition on motion for judgment notwithstanding verdict and, in the alternative for a new trial, filed by R. J. Reynolds Tobacco Company and L. R. Donnelly.

29. Petition of Rulon D. Hair on motion for judgment notwithstanding verdict and, in the alternative, for a new trial.

30. Minute entry denying motions.

31. Notice of appeal filed by R. J. Reynolds Tobacco Company and L. R. Donnelly.

32. Cost Bond on appeal of R. J. Reynolds Tobacco Company and L. R. Donnelly.

33. Petition for approval of supersedeas and stay on appeal. [456]

34. Order approving bond and granting stay of execution against R. J. Reynolds Tobacco Company and L. R. Donnelly.

35. All testimony taken at the trial, the same being contained in the reporter's transcript, including all instructions given to the jury and all instructions refused and exceptions taken thereto, two copies of which transcript, including such instructions and exceptions, are herewith filed with the Clerk.

36. The exhibits to be printed in the record, to-wit:

Exhibits numbered:

11—Report of L. R. Donnelly

14—Salesman agreement on delivery of car

19—Salesman agreement on delivery of car

(1942)

20—Letter, Reynolds Tobacco Company to
salesmen, November 4, 1937 (rejected)

21—Letter, Darr to Hair, June 12, 1940 (re-
jected)

22—Copy of judgment docket, Probate Court

23—Instructions of R. J. Reynolds Tobacco
Company and answer of Rulon D. Hair,
dated March 17, 1938

37. Stipulation re Exhibits.

38. Order re Exhibits.

39. All Court minutes.

40. Two copies of reporter's transcripts.

41. Designation of contents of record on appeal
by R. J. Reynolds Tobacco Company and L. R.
Donnelly, and proof of service.

42. Statement of points by R. J. Reynolds To-
bacco Company and L. R. Donnelly, and proof of
service.

Dated this 22nd day of January, 1944.

E. B. SMITH

Residing at Boise, Idaho

A. L. MERRILL

R. D. MERRILL

Residing at Pocatello, Idaho

Attorneys for R. J. Reynolds
Tobacco Company and L.
R. Donnelly [457]

Service of the foregoing Designation of Contents
of Record on Appeal, by receipt of copy thereof,

admitted to have been made this 22 day of January, 1944.

GLEN A. COUGHLIN

Residing at Montpelier, Idaho

B. W. DAVIS

Residing at Pocatello, Idaho

Attorneys for Plaintiffs and
Appellees.

ROY L. BLACK

JOHN R. BLACK

Residing at Pocatello, Idaho

Attorneys for Rulon D. Hair

[Endorsed]: Filed January 24, 1944. [458]

[Title of Court and Cause.]

STATEMENT OF POINTS ON WHICH AP-
PELLANTS R. J. REYNOLDS TOBACCO
COMPANY AND L. R. DONNELLY IN-
TEND TO RELY ON APPEAL

Come Now R. J. Reynolds Tobacco Company and L. R. Donnelly, two of the above named defendants and appellants, and make the following statement of points upon which they intend to rely on the appeal taken by them to the Circuit Court of Appeals for the Ninth Circuit in the above entitled cause:

I.

The trial Court should not have permitted the filing of amended complaint in this cause; the allegations contained therein are insufficient to im-

pose liability upon these appellants, particularly wherein there appears an attempt to charge these appellants with negligence in employing Rulon D. Hair and entrusting him with the automobile referred to in the pleadings; that the amended complaint does not state a claim against these appellants or either of them.

II.

The trial Court should have required the plaintiffs to elect as between two theories advanced in the amended complaint, that is to say, whether they relied for recovery upon the charge [459] of direct negligence against these appellants, or upon the rule of respondeat superior as applied to Rulon D. Hair.

III.

There was no negligence on the part of either of these two appellants proximately causing the injury alleged in the amended complaint; further, the defendant, Rulon D. Hair, was not acting as a servant, agent or employee of said appellants, or either of them, nor within the scope of any employment for said appellants, at the time of the accident alleged in the amended complaint.

IV.

The trial Court should not have permitted introduction at the trial of the cause, various items of evidence appearing in the transcript of the evidence and to which these appellants interposed objections, particularly the testimony of F. H. Smullen, Ben

Buskirk and L. R. Donnelly, relating to the so-called Meyers incident, and the testimony of Sid Close pertaining to the so-called Dubois incident, and plaintiffs' Exhibit No. 22, which purported to be a certified copy of a record of the Probate Court of Clark County, Idaho; that recitation of the foregoing items is not deemed exclusive, in that there are various other claimed errors committed in the admission and rejection of evidence, as disclosed by the record of the testimony in said cause.

V.

The evidence introduced at the trial of said cause was wholly insufficient to justify or sustain a verdict against these appellants upon any theory; more particularly, the evidence fails to show these appellants guilty of negligence in employing and continuing in their employment Rulon D. Hair and delivering to him the panel truck referred to in the amended complaint. [460]

VI.

The evidence conclusively proves that at the time of the accident alleged in the amended complaint, Rulon D. Hair was not acting within the scope of any employment for and on behalf of these appellants.

VII.

The evidence is further insufficient to show that, at the time of said accident, Rulon D. Hair was in anywise guilty of violating the gratuitous guest statute of the State of Idaho, nor that these de-

fendants, or either of them, was in anywise liable for the conduct of Rulon D. Hair.

VIII.

The trial court should have granted the motion for a directed verdict in favor of these two appellants, upon the grounds made at the close of the evidence and re-stated in their petition on motion for judgment notwithstanding the verdict and, in the alternative, for a new trial, filed in said cause following the verdict of the jury, for the reasons and upon the grounds stated in said petition and motion.

IX.

There was no waiver on the part of these appellants of their injunction that Rulon D. Hair should not transport a guest in said panel truck.

X.

Avenell Newby was riding in the panel truck as a gratuitous guest of Rulon D. Hair and not of these appellants, and they, these appellants, are in nowise responsible for the conduct of Rulon D. Hair at the time of said accident; that Avenell Newby participated in all of the acts of Rulon D. Hair and joined with him in each and every act performed prior to the accident, and was in a position to be as observant of surrounding conditions immediately preceding said accident and of [461] all acts of commission or omission on the part of Rulon D. Hair, if any there were, as was Hair himself, and, having thus joined with Hair in said trip

and in the conduct thereof, became barred and estopped, and the plaintiffs and appellees became barred and estopped from claiming damages for any injury that might have been sustained by Avenell Newby as a gratuitous guest of Rulon D. Hair.

XI.

Avenell Newby assumed any and all risk attendant upon the trip with Rulon D. Hair, and, by reason of the matters and things recited in the testimony, became estopped from claiming damages by reason of anything suffered or permitted at the time and place mentioned in the amended complaint, which estoppel is effective as against the plaintiffs and appellees.

XII.

There should not have been given to the jury those certain instructions to which objection was made by these appellants at the time said instructions were given, and there should have been given to the jury those requested instructions presented by these appellants and refused by the trial Court.

XIII.

Generally, there was no negligence on the part of these appellants proximately causing the death of Avenell Newby, these appellants were in nowise liable or responsible at the time and place of said accident for acts of commission or omission, if any there were, by Rulon D. Hair; that at said time and place Rulon D. Hair was not acting within the scope of his employment as an agent, servant or

employee of these appellants, or either of them, and they are in nowise liable under the guest statute of Idaho, or otherwise, to the appellees in this cause; that evidence prejudicial to these appellants [462] was improperly admitted at the trial of said cause and, that the trial Court gave to the jury erroneous instructions and improperly refused to give certain requested instructions; that the verdict against these appellants and the judgment entered thereon are erroneous and in nowise supported by the evidence or the law governing and controlling this action.

Dated January 22, 1944.

E. B. SMITH

Residing at Boise, Idaho

A. L. MERRILL

R. D. MERRILL

Residing at Pocatello, Idaho

Attorneys for R. J. Reynolds

Tobacco Company and L. R.

Donnelly

Service of the foregoing Statement of Points by receipt of copy thereof admitted to have been made this 22 day of January, 1944.

GLENN A. COUGHLIN

Residing at Montpelier, Idaho

R. W. DAVIS

Residing at Pocatello, Idaho

Attorneys for plaintiffs and
appellees

ROY L. BLACK

JOHN R. BLACK

Residing at Pocatello, Idaho

Attorneys for Rulon D. Hair

[Endorsed]: Filed January 24, 1944. [463]

[Title of Court and Cause.]

ORDER

Good cause appearing therefor,

It Is Ordered That the time for filing and docketing of the transcript on appeal in the United States Circuit Court of Appeals for the Ninth Circuit, in the above entitled cause, be, and the same hereby is, extended to March 25, 1944.

Dated at Boise, Idaho, this 25th day of February, 1944.

CHASE A. CLARK

United States District Judge.

[Endorsed]: Filed Feb. 25, 1944. [464]

[Title of Court and Cause.]

CERTIFICATE OF CLERK OF UNITED
STATES DISTRICT COURT TO TRAN-
SCRIPT OF RECORD

United States of America,
District of Idaho—ss.

I, W. D. McReynolds, Clerk of the District Court of the United States, for the District of Idaho, do hereby certify the foregoing typewritten pages numbered 1 to 464 inclusive, to be a full, true and correct copy of so much of the record, papers and proceedings in the above entitled cause as are necessary to the hearing of the appeal thereon in the United States Circuit Court of Appeals for the Ninth Circuit, in accord with designation of contents of record on appeal of the appellants, as the same remain on file and of record in the office of the Clerk of said District Court, and that the same constitutes the record on the appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I Further Certify That the fees of the Clerk of this Court for preparing and certifying the foregoing typewritten record amount to the sum of \$54.25, and that the same have been paid in full by the appellants.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, this 13th day of March, 1944.

[Seal]

W. D. McREYNOLDS
Clerk. [465]

[Endorsed]: No. 10708. United States Circuit Court of Appeals for the Ninth Circuit. R. J. Reynolds Tobacco Company and L. R. Donnelly, Appellant, vs. George H. Newby, in his own behalf, Richard Arlen Newby and Patty Ann Newby, both minors, by their Guardian ad Litem, George H. Newby, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Idaho, Eastern Division.

Filed March 15, 1944.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10708

R. J. REYNOLDS TOBACCO COMPANY and
L. R. DONNELLY,

Appellants,

vs.

GEORGE H. NEWBY, in his own behalf, RICH-
ARD ARLEN NEWBY and PATTY ANN
NEWBY, both minors, by their guardian ad
litem, George H. Newby,

Appellees.

STATEMENT OF POINTS UPON WHICH AP-
PELLANTS INTEND TO RELY ON AP-
PEAL, AND DESIGNATION OF RECORD
NECESSARY FOR CONSIDERATION
THEREOF

Come Now the appellants and hereby adopt as
their Statement of Points upon which they intend
to rely on appeal, the Statement of Points on which
Appellants R. J. Reynolds Tobacco Company and
L. R. Donnelly Intend to Rely on Appeal, hereto-
fore filed with the Clerk of the United States Dis-
trict Court for the District of Idaho, from which
Court this appeal is taken, such Statement of
Points being that appearing in the transcript cer-
tified to this Court by said Clerk of the United
States District Court for the District of Idaho.

The appellants hereby designate for printing, as

the parts of record necessary for the consideration of said points, the entire transcript as certified to the Clerk of this Court by the said Clerk of the United States District Court for the District of Idaho, including those exhibits which are enumerated in Paragraph numbered 36 of the Designation of Contents of Record on Appeal; expressly specifying, however, that the exhibits not therein requested to be printed be not printed, being Exhibits numbered 2, 3, 4, 5, 6, 7, 8, 9, 10 12, 13, 15, 16, 17 and 18, referred to in the Stipulation relating thereto filed with said Clerk of the United States District Court for the District of Idaho, and appellants pray that such exhibits be considered in their original form by this Court as a part of the record on such appeal.

E. B. SMITH

Residence and Post Office Address: Boise, Idaho

A. L. MERRILL

R. D. MERRILL

Residence and Post Office Address: Pocatello, Idaho
Attorneys for Appellants.

Service of the foregoing Statement admitted to have been made this 13 day of March, 1944.

GLENN A. COUGHLIN

Residence and Post Office Address: Montpelier, Idaho

B. W. DAVIS

Residence and Post Office Address: Pocatello, Idaho

Attorneys for Appellees.

ROY L. BLACK

Attorney for Rulon D. Hair

P. O. Address and Residence:
Pocatello, Idaho

[Endorsed]: Filed Mar. 17, 1944. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

APPLICATION FOR ORDER DISPENSING
WITH PRINTING EXHIBITS

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The petition of R. J. Reynolds Tobacco Company and L. R. Donnelly respectfully shows:

That an appeal has been perfected by your petitioners to this Court from a judgment rendered in the United States District Court for the District of Idaho, in a suit wherein George H. Newby, in his own behalf, Richard Arlen Newby and Patty Ann Newby, both minors, by and through George H. Newby, their guardian ad litem, were plaintiffs, and

R. J. Reynolds Tobacco Company, L. R. Donnelly and Rulon D. Hair were defendants.

There were introduced in evidence at the trial of the cause by the respective parties, the following exhibits, to-wit:

Plaintiffs' Exhibits numbered 3 to 7, inclusive; 10 to 13, inclusive; 15 to 18, inclusive; and 22; also defendants' Exhibits numbered 2, 8, 9, 14, 20 and 22; also Defendants' Exhibits numbered 19 and 21 were offered in evidence and rejected by the trial court.

That Plaintiffs' Exhibits numbered 11 and 22, and Defendants' Exhibits numbered 14, 19, 20, 21 and 23 will be printed in full in the record.

That the exhibits which appellants and appellees believe would be impractical and difficult to print and for which no application to print has been made, are: Plaintiffs' Exhibits numbered 3 to 7, inclusive; 10, 12, 13; and 15 to 18, inclusive; also Defendants' Exhibits numbered 2, 8 and 9, being a map, photographs, and involved printed reports and records, which appellants and appellees believe would be impractical and difficult to print, being referred to in the stipulation by appellants and appellees filed with the Clerk of the United States District Court for the District of Idaho, from which Court said appeal has been taken, such exhibits to be taken and considered as a part of the record on such appeal.

All of said original exhibits have been forwarded by the Clerk of the United States District Court for the District of Idaho to the Clerk of the United

States Circuit Court of Appeals for the Ninth Circuit. There is attached hereto an affidavit of E. B. Smith, which is made a part hereof.

Wherefore, your petitioners pray for an order dispensing with the printing of Plaintiffs' Exhibits numbered 3 to 7, inclusive; 10, 12 and 13; and 15 to 18, inclusive; and Defendants' Exhibits numbered 2, 8 and 9; and that all of the said original exhibits be considered by this Court on such appeal.

R. J. REYNOLDS COMPANY
and **L. R. DONNELLY**

By E. B. SMITH

Residence and Post Office Address: Boise, Idaho

By A. L. MERRILL and

R. D. MERRILL

Residence and Post Office Address: Pocatello, Idaho

Attorneys for Appellants

So ordered,

CURTIS D. WILBUR

United States Circuit Judge

[Title of Circuit Court of Appeals and Cause.]

AFFIDAVIT OF E. B. SMITH

State of Idaho

County of Ada—ss.

E. B. Smith, being first duly sworn, deposes and says:

That he is one of the attorneys for R. J. Reynolds

Tobacco Company and L. R. Donnelly, appellants herein, and makes this affidavit on behalf of said appellants for the purpose of securing an order dispensing with the printing of certain exhibits, all as stated in the Application for Order attached hereto.

That judgment was rendered herein in favor of the plaintiffs and against the defendants on October 23, 1943; that on January 20, 1944, defendants R. J. Reynolds Tobacco Company and L. R. Donnelly perfected an appeal to this Court by filing their Notice and Undertaking on Appeal, and have since served and filed the additional papers required by the rules of this Court.

That on January 24, 1944, the Honorable Chase A. Clark, District Judge, made an order directing that the original exhibits numbered 2 to 10, inclusive, 12, 13, and 15 to 18, inclusive, be forwarded to this Court with the record on appeal, to be used on such appeal, following stipulation of the parties through their respective counsel of record, entered into on January 22, 1944, and duly filed, to the effect that such exhibits are of such character as to be difficult to print and can best be considered by the appellate court in their original form, thus leaving for printing such exhibits as did not offer difficulty in printing; that the exhibits which it is requested be not printed present difficulties in printing and would decidedly encumber the record, as will more particularly appear from an examination of said exhibits, and that such exhibits may probably serve the appellate court better in their original form.

E. B. SMITH

Subscribed and sworn to before me this 13th day of March, 1944.

[Seal]

WILLIS C. MOFFATT

Notary Public for Idaho, residing at Boise, Idaho.

My Commission expires Jan. 28, 1946.

Copy of foregoing application for order admitted this 13th day of March, 1944.

GLENN A. COUGHLIN

Montpelier, Idaho

B. W. DAVIS

Pocatello, Idaho

Attorneys for Plaintiffs.

ROY L. BLACK

Attorney for Rulon D. Hair

P. O. and Residence: Pocatello, Idaho

[Endorsed]: Filed Mar. 17, 1944. Paul P. O'Brien, Clerk.

